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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

PREFATORY NOTE

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Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized by regulatory agency and statute, and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

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LIST OF DECISIONS REPORTED

JULY - DECEMBER 1989

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS

MISCELLANEOUS ORDERS

LIST OF DECISIONS REPORTED

JULY - DECEMBER 1989

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

LIST OF DECISIONS REPORTED

JULY - DECEMBER 1989

PACKERS AND STOCKYARDS ACT

In re: RAYMOND HUTSON, DALE P. COOPER, and COOPER LIVESTOCK MARKETING AGENTS, INC.
P&S Docket No. D-88-41.
Decision and Order filed July 28, 1989.

Agency - Actual authority - Apparent authority.

Respondent Raymond Hutson purchased cattle from three different dealers and paid for the cattle with checks drawn on accounts which contained insufficient funds. Since Hutson agreed to a consent decision, the issues in this matter were whether Hutson acted as an agent for Respondents Cooper Livestock Marketing Agents and Dale P. Cooper and whether Cooper Livestock was under the management, direction and control of Dale Cooper.

Judge Bernstein held that Hutson was not an agent of Cooper Livestock or Dale P. Cooper in connection with the purchases and, therefore, Cooper Livestock and Dale Cooper did not violate the Packers and Stockyards Act. There was neither actual nor apparent authority for Hutson to make the purchases for the other Respondents.

Allan R. Kahan, for Complainant.
Robert H. Mitchell and Newell E. Wright, Jr., for Respondents.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) ("the Act") instituted by a Complaint filed on February 23, 1988, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that on the following dates Respondent Cooper Livestock Marketing Agents, Inc. ("Cooper Livestock") under the management, direction and control of Respondent Dale P. Cooper, through its agent Respondent Raymond Hutson, purchased the following livestock from the following market agencies for resale through Cooper Livestock.

Date of Purchase	Date of Number Check	Cattle	Payee	Check Amount
4/24/87	4/29/87	331	Arrowhead Livestock Wichita Falls, Texas	$141,067.03
5/01/87	5/01/87	272	Arrowhead Livestock	118,139.30
4/30/87	5/08/87	174	Comanche Livestock Auction Comanche, Oklahoma	87,629.52

The Complaint further alleges that Hutson issued checks in purported payment for the livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have sufficient funds in [illegible] ank account. Complainant further alleged that an additional

purchase was made on May 2, 1987, of 190 head of cattle from Bowie Livestock Commission, Inc. for $72,351.15 and that as of December 1, 1987, $394,187 remained unpaid for these livestock transactions.

Hutson's March 18, 1988, Answer denied each and every allegation of the Complaint. An Answer by Cooper Livestock and Dale Cooper, filed March 25, 1988, denied the allegations and specifically denied that Hutson was acting as an agent, employee, or at the direction or under the control of Cooper or Cooper Livestock. On May 10, 1989, I issued a decision with respect to Hutson. Hutson consented to that decision and to the issuance of an Order which required him to cease and desist from certain practices and be prohibited from registering under the Act for five years.

I presided over a hearing in Oklahoma City, Oklahoma, on May 9 and May 10, 1989. Complainant was represented by Allan R. Kahan, Esq. Respondents were represented by Robert H. Mitchell, Esq. and by Newell E. Wright, Jr., Esq. Complainant called seven witnesses and introduced 15 exhibits (CX). Respondents called four witnesses and introduced six exhibits (RX).

The parties filed Proposed Findings of Fact, Proposed Conclusions of Law and Briefs on June 26, 1989. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

In the following dates in April and May of 1987, Respondent Raymond Hutson purchased the following cattle from Arrowhead Livestock Sales Co., Comanche Livestock Auction, and Bowie Livestock Commission, Inc. at the following prices:

Date	Purchased From	No. Head	Amount
4/24/87	Arrowhead Livestock Sales Co. Wichita Falls, TX (TX-332)	331	$141,067.03
5/01/87	" " "	272	118,139.30
4/30/87	Comanche Livestock Auction Comanche, OK (OK-119)	174	87,629.52
5/02/87	Bowie Livestock Comm., Inc. Bowie, TX (TX-310)	190	72,351.15

Hutson directed the sellers to recap or attribute the purchases to Respondent Cooper Livestock Marketing Agents, Inc. (Tr. 20, 24, 84, 355) Hutson paid for these purchases by writing checks on his own bank account.

When the checks were negotiated, they were returned by Hutson's bank because Hutson had insufficient funds on deposit to cover the checks. (CX 5, 6, 7, 8, and 10) Neither Hutson nor Cooper Livestock have paid for these purchases. Most of the purchase prices remain unpaid. The sellers have filed claims against Cooper Livestock's bonds. (CX 6, 7 and 8)

Since a consent decision has been issued with respect to Hutson, the pivotal issue is whether Hutson was acting in behalf of Cooper Livestock in connection with these purchases. If that is the case, the violations by Hutson are also violations by Cooper Livestock. If it is found that Hutson represented Cooper Livestock, a second issue is whether sanctions imposed against Cooper Livestock should also be imposed against Dale Cooper as a principal of Cooper Livestock. In order to determine these issues, the circumstances of the sales and the relationships of the parties must be carefully examined.

Before May 6, 1985, Dale Cooper operated an unincorporated commission company called Cooper Livestock Marketing Agents ("Cooper Livestock Agents"). (Tr. 223) Livestock commission firms operate as markets and sell livestock on a commission basis. As such, Cooper Livestock Agents had a seat on the Oklahoma City Livestock Exchange. (Tr. 127, 292) At about that time, Cooper Livestock Agents was the largest firm and one of the most successful firms in that exchange. (Tr. 292) At that time, Dale Cooper was the sole owner of Cooper Livestock Agents.

Cooper and Hutson have known each other for about 20 years. (Tr. 225) Since before 1980, Cooper had used Hutson's services. (Tr. 243) At least since 1985, Hutson had bought cattle for Cooper. It was not unusual for Hutson to recap cattle to Cooper. (Tr. 245)

Bobby Rodenberger was an employee of Cooper Livestock Agents in 1985. He had started out doing low level work but because he was bright and industrious he assumed more and more responsibilities. (Tr. 247)

By written agreement dated May 6, 1985, Cooper sold Cooper Livestock Agents to Rodenberger. (RX 3; Tr. 223) Rodenberger incorporated the business into Respondent Cooper Livestock Marketing Agents, Inc. ("Cooper Livestock") on August 6, 1985. (RX 4) On August 15, 1985, the initial officers of the corporation were Dale Cooper as president, Raymond Hutson as vice-president, and Karen Rodenberger, Bobby's wife, as secretary and treasurer. (RX 4) At the time of incorporation, Cooper held all 500 shares of the corporation's stock as security, however, on April 2, 1986, the stock was transferred to Rodenberger. (Tr. 273-274)[1]

Hutson remained a vice-president of the corporation until November 2, 1986 when the following officers were elected: Dale Cooper as president, Bob Rodenberger as vice-president, and Karen Rodenberger as secretary and treasurer. (RX 4; Tr. 279) Although the annual report filed for Cooper Livestock with the Packers and Stockyards Administration shows that Raymond Hutson was vice-president of the firm as of December 31, 1986, I find, as Rodenberger credibly testified, that the designation of Hutson on that form as vice-president as of December 31, 1986, was a mistake. Rodenberger explained that form was mistakenly copied from the prior year's form without appropriate modification. Rodenberger testified and I find that at that time

[1]In its post-hearing brief, Complainant questions the credibility of the evidence regarding the sale and ensuing corporate transactions. I have no such doubt. The testimony of Messrs. Cooper, Rodenberger, and Jones, as well as the exhibits, shows with utter consistency that the sale and other transactions took place as I have found herein.

Rodenberger and not Hutson was vice-president of the corporation. (Tr. 280-282)

Soon after Hutson's cattle purchases in April and May of 1987, and because of the adverse publicity against Cooper Livestock and Rodenberger's inability to renew necessary bonds, Dale Cooper was compelled to take the firm back from Bobby Rodenberger. (Tr. 233-234)

Although Hutson was designated as vice-president of Cooper Livestock between August 15, 1985 and November 2, 1986, Hutson never was an employee of Cooper Livestock or its predecessor firm, Cooper Livestock Agents. (Tr. 228, 352)

On many prior occasions, Hutson purchased livestock for Cooper Livestock and for Dale Cooper. On many prior occasions, Hutson recapped livestock to Cooper Livestock and to Dale Cooper and Cooper Livestock. On those occasions, Hutson was purchasing livestock as an agent for Cooper Livestock or Dale Cooper. On other occasions, Hutson purchased livestock for other firms and other people, including Goodknight. He had even purchased cattle from Bowie Livestock for Goodknight. (Tr. 182, 187-188) On other prior occasions, Hutson recapped cattle to other persons and other firms. On those occasions, Hutson acted as agent for those individuals and firms. Thus, Hutson was not an exclusive agent for Cooper Livestock or for Dale Cooper. He represented several firms and, at times, he also bought cattle in his own name.

In connection with the purchases in question by Hutson from Arrowhead, Bowie, and Comanche, Raymond Hutson bought the cattle for himself and not for Cooper Livestock or for Dale Cooper. No official in Cooper Livestock authorized Hutson to buy this cattle or knew that Hutson was buying this cattle. The testimony of Dale Cooper, Bobby Rodenberger and Raymond Hutson is consistent on this point. Since the proceeding against Hutson has been resolved, Hutson would have no reason to lie about this. In fact, it might make him look better if he had implied that he represented Cooper. I found Hutson to be truthful and I believed him when he testified that he was not authorized by Cooper Livestock or by Dale Cooper to act in their behalf in connection with these purchases.

Although Hutson purchased the livestock in question for himself, it appears that the reason why he recapped the livestock to Cooper Livestock in these instances is because he lacked a necessary bond. Shortly before these transactions, by letter dated February 19, 1987, Harry Schaaf, regional supervisor of the Packers and Stockyards Administration, wrote Hutson "We have information that you are engaging in the business of buying and selling livestock." The letter advised Hutson that he had no bond as required and that he must obtain an acceptable bond or its equivalent. (CX 3) Michael Pacette, Complainant's witness, testified that the reason why the letter was written was because, as an independent agent, Hutson needed a bond. He would not need such a bond if he was, in fact, buying for Cooper or for others. (Tr. 47-48) The principals' bonds could be used for such purchases. (Tr. 48) Mr. Schaaf wrote a follow-up letter to Hutson on March 26, 1987. (CX 4) The letter stated in part, "It has been determined that you are continuing your livestock operations in commerce as a person subject to the

Act. Therefore, you are in violation of the registration and bonding requirements." The letter continued to remind Hutson that he needed to obtain a bond or its equivalent.

The fact that Complainant wrote these letters to Hutson indicates that shortly before the sales in question the Packers and Stockyards Administration was aware that Hutson was buying cattle in his own name.

These letters also help to explain why on those occasions Hutson requested that the cattle be recapped to Cooper Livestock even though Cooper Livestock had not authorized Hutson to buy the cattle for that firm. Hutson testified:

> "Mr. Caussey, the manager of Arrowhead Livestock, said that P&S people had been by and they noticed that several people did not have bonds and I was one of them.
>
> And he said, 'In the future they'll probably be getting in contact with you.' So, he said, 'Right now, let's just recap them to Cooper Livestock until they contact you to get a bond.'
>
> And in February or first of March, I did get a letter from P&S. So, it was up to - the reason Mr. Caussey wanted them to recap them to Cooper Livestock was that he wanted me to keep coming to his sales and that would help keep the market up." (Tr. 355)

The Arrowhead purchase was the first of the purchases in question. Having successfully solved his bond problem by recapping to Cooper Livestock in the Arrowhead purchase, Hutson continued the practice for the same reason in his subsequent purchases from Arrowhead, Comanche and Bowie.

In addition, Hutson arranged with Arrowhead, Comanche, and Bowie for them to hold the checks for periods of time to enable him to obtain sufficient funds to cover the amounts of the checks. (Tr. 51, 161, 100, 111-112, 189-190, 101) Mr. Schaaf of P&S testified that P&S learned that Hutson had been buying these livestock on a float. He defined the process as one in which a buyer issues a check with insufficient funds in his account to pay for the purchase and hopes that before the check is presented he will be able to deposit sufficient funds in the account. (Tr. 100-102) The fact that these three firms knew that at the time that Hutson wrote checks to them that he had insufficient funds on deposit to cover the purchases and that the three firms agreed to hold the checks for periods of time to enable Hutson to obtain funds to cover the purchases, is further evidence that they were looking to Hutson and not to Cooper Livestock to be responsible for these purchases. If they believed that Cooper Livestock was, in fact, the purchaser, instead of becoming parties to these arrangements to hold checks to enable covering funds to be deposited, it would have been easier for them to ask Hutson for Cooper Livestock's checks.

The cattle market in the Oklahoma City area is like a close-knit community in which professionals know much about each other's activities. Dale Cooper testified to this effect without contradiction. He stated, "It's like a Peyton Place. Everybody knows what everybody is doing out

there at the stockyards." (Tr. 259) In fact, Raymond Hutson lives next door to Raymond Brown, Comanche's owner (Tr. 108, 352) and Raymond Hutson's son is married into the Ogle family, the family that owns Bowie. (Tr. 352) It therefore, was well known that Hutson bought cattle for himself and for others as well as for Cooper Livestock and for Cooper. (Tr. 351-352)

Following the sales in question, Cooper Livestock consistently denied that it authorized Hutson to represent it. In fact, after the check to Comanche was dishonored, when Brown called Cooper, Cooper told Brown, "You are probably in more trouble than I am." (Tr. 207-208)

Neither Arrowhead, Comanche nor Bowie ever made any claims against Cooper Livestock or against Cooper in connection with the purchases in question. They did make claims against Cooper Livestock's bond. However, the amount of Cooper's bond is far less than the amounts of these purchases.

Neither Cooper Livestock nor Cooper have received any of the cattle that Hutson purchased from Bowie, Arrowhead and Comanche. The cattle were sold at the Cooper Livestock Auction in behalf of Raymond Hutson as owner. (Tr. 263) Cooper Livestock did not receive any proceeds from these sales. However, it did receive normal auction market commissions. (Tr. 264-265)

Mr. Pacette of P&S testified that he found out that Dale Cooper did not authorize Hutson to recap cattle to Cooper Livestock or to Dale Cooper. (Tr. 56)

Mr. Schaaf, of P&S, testified that he did not know that Cooper authorized Hutson to buy the cattle for Cooper Livestock. In concluding that this proceeding should be instituted against Cooper Livestock and Cooper, Schaaf relied on "legal advice that a corporate officer has legal authority to act and give direction and instruct on behalf of a corporation." (Tr. 117-118)

As proof that Hutson was an agent for Cooper Livestock, Complainant introduced into evidence a copy of a business card of Raymond Hutson. (CX 12) On the front was Raymond Hutson's name and Cooper Livestock's name and logo. The card's reverse side contained a rubber-stamped impression of the name Hutson Cattle Co. followed by the name Raymond Guy Hutson and Hutson's address and phone number. This card does not prove that Hutson represented Cooper Livestock in connection with transactions in question. In fact, the card confirms the duality of Hutson's relationships. On the one hand, he represented Cooper Livestock and other firms; on the other hand he bought cattle for his own firm. The front of the card shows his relationship with Cooper Livestock; the reverse shows that he was acting for his own individual interests. Mr. Pacette admitted that it was common for Hutson and for other cattle buyers to carry cards of firms that they represented although he testified that he had never seen a card which showed on one side that the individual represented a firm and on the reverse that he represented himself. (Tr. 58-60)

As further evidence that Hutson was a representative of Cooper Livestock, Complainant showed that in May 1986, Cooper Livestock purchased a radio announcement in which Cooper Livestock was mentioned and, although Hutson was not mentioned by name, Hutson's telephone number appeared in the announcement. (CX 11; Tr. 141-145) I do not find that this shows that,

in connection with the transactions in question, Hutson represented Cooper. The radio announcement pre-dated the purchases by almost a year.

Following Cooper's sale of Cooper Livestock to Rodenberger, in May 1985, Cooper was associated with the firm as a consultant. This was both to protect Cooper's financial interest as a creditor of Rodenberger and to ease the transition and minimize any loss of business as a result of the change of ownership. Although Cooper retained the stock in the corporation for a period of time after the sale to protect his interest, after the sale Rodenberger was actually in charge and was the *de facto* operator of Cooper Livestock. (Tr. 298) After the sale, Cooper relinquished his private office to Rodenberger. (Tr. 266) Cooper had a private office elsewhere about five to six miles from Cooper Livestock's office. (Tr. 268) After the sale, the firm's checks were signed by Rodenberger and not by Cooper. (Tr. 257-258) After the sale, Rodenberger and not Cooper, attended the Oklahoma City Livestock Exchange meetings as a representative of Cooper Livestock. (Tr. 263)

Dale Cooper has suffered great financial harm and harm to his reputation because of these purchases by Hutson. Cooper testified without contradiction that soon after the purchases a local newspaper, the *Daily Oklahoman,* obtained an United States Department of Agriculture press release that stated that Raymond Hutson and Dale Cooper wrote checks without having sufficient funds on deposit. Cooper continued, ". . . how many customers want to go back to Cooper Livestock and do business with me now after a press release is turned loose in the *Daily Oklahoman* saying I've got hot checks?" (Tr. 233) Because of this publicity and because of the sellers' claims against Cooper Livestock's bonds and Rodenberger's inability to obtain replacement bonds, Rodenberger was unable to operate the firm and Cooper had to take the firm back from Rodenberger. (Tr. 233) Cooper described the situation as follows:

> "So, I take this company back and try to run it. And I got the P&S running up and down my back all the time trying to figure out what I've done, and I don't even know what I've done. Thank goodness we have this hearing today. Maybe somebody could tell me.
>
> But I'm trying to run this company. I can't run this company. It falls apart. I can't generate my business the way I have in the past. They took my borrowing ability away from me. They've taken my ability to manage away from me. They've taken my mind away from me. And they just - you know, they put me back to working for wages like I was doing when I was fifteen years old." (Tr. 233-234)

David Jones, a C.P.A., who in 1987 was president of Cooper Ag Services, another firm owned by Dale Cooper that managed investments for people in the cattle business, testified that at the time of the transactions Dale Cooper had other businesses and financial relationships. However, as a result of the claims by Comanche, Bowie, and Arrowhead for approximately $374,000 against Cooper Livestock's bonds in connection with Hutson's purchases, Cooper Livestock's Clause II and Clause I bonds were canceled, and that was the reason that Bobby Rodenberger was unable to continue operating the

business. Rodenberger was unable to replace the bonds. (Tr. 300-305) As a result, the Oklahoma City Livestock Exchange said that because Cooper Livestock had no bonds it could not buy and sell cattle. (Tr. 308) Rodenberger needed a minimum of $160,000 in cash to replace the bonds. (Tr. 309) Rodenberger therefore called Cooper and said "Here are the keys. I can't make it. I still owe you $300,000 on the sales contract. You better just come get it." (Tr. 310)

Cooper Livestock was badly damaged by these events. Jones testified that as a result, "The sales volume just plummeted right after this happened." As a result of information about these checks, ". . . word slowly leaked out over the month of May . . . by June the cattle volume at Cooper's was way down . . . Dale took it, started to build the volume back through about March and then this press release came out . . . the press release that P&S put out that said Dale Cooper passed bad checks." (Tr. 311)

Jones testified that the business never recovered after that. "Because of Dale's problems, he has basically had to shut it down so he could get to the cash that was up for the bonds to pay the creditors." (Tr. 312) When asked about Dale Cooper's present financial situation, Jones testified that Dale Cooper is broke, insolvent. (Tr. 314) Before the purchases by Hutson, Cooper's net worth was over a million dollars. (Tr. 315) Thus, as a result of the adverse publicity and the bond claims, Jones concluded that Dale Cooper has suffered immense financial damage. Cooper is now auctioneering for wages. (Tr. 316) When Cooper sold his firm to Rodenberger, it was the largest firm in the Oklahoma City Livestock Exchange (Tr. 292-317) and the Oklahoma City Livestock Exchange is the largest feeder market in the country. (Tr. 313)

Conclusions of Law

Section 312(a) of the Packers and Stockyards Act, 1921, as amended ("the Act" provides:

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

Section 409(a) of the Act provides in pertinent part:

> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price.

Section 409(c) of the Act provides in pertinent part:

> Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act. (7 U.S.C. § 228b)

In purchasing the cattle set forth in the findings of fact, Raymond Hutson violated the above statutory provisions.

Although Raymond Hutson, asked the sellers to recap the cattle to Cooper Livestock, Raymond Hutson was not an agent of Cooper Livestock in connection with these purchases. Therefore, neither Cooper Livestock nor Dale P. Cooper violated the Act in connection with Hutson's purchases. Cooper Livestock did not authorize Hutson to make these purchases. Hutson did not make these purchases for Cooper Livestock. Hutson made the purchases for himself. Hutson recapped the purchases to Cooper Livestock because, lacking a valid bond, Hutson could not make the purchases in his own name. In letters in February and March of 1987 P&S reminded Hutson that he needed to obtain a bond to purchase cattle in his own name.

The rule of apparent authority cited by Complainant does not make Cooper Livestock and Cooper liable for violations of the Act. It was general knowledge in the trade that Hutson bought cattle for others and for himself as well as for Cooper Livestock. Thus, it could not necessarily be assumed that in these instances Hutson bought the cattle for Cooper Livestock. The fact that all three sellers entered into schemes to hold Hutson's checks for a period of time to enable Hutson to obtain sufficient funds to cover the checks, is evidence that they knew that they were dealing with Hutson himself. If they actually believed the purchases were for Cooper Livestock, instead of going along with such schemes, it would have been easy for the sellers to request payment from Cooper Livestock.

That P&S twice requested Hutson to obtain a bond shortly before these transactions, a bond that would not be needed for Hutson's purchases for Cooper Livestock but would be needed for Hutson's purchases for his own account, confirms that P&S also knew that Hutson bought cattle other than for Cooper Livestock.[2]

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[2]Mr. Pacette testified:

Q. And he was also an independent agent, too, wasn't he? Because he had to have a bond.
A. Yes.
Q. He was that, too, wasn't he?
A. Yes.
Q. And didn't you find he bought cattle for other people, too? He bought cattle fc Woodknight Feed Yards?
A. Yeah, he shipped cattle there.
Tr. 59; also: testimony of Harry Schaaf at Tr. 123-125)

Order

This Complaint is dismissed with prejudice.

This Decision and Order shall become final 35 days after service thereof upon Respondent unless appealed to the Judicial Officer within 30 days as more fully set forth in the Rules of Practice and Procedure (7 C.F.R. § 1.131 and 1.145, *et seq.*).

[This Decision and Order became final September 18, 1989.-Editor]

In re: O & S CATTLE CO.
P&S Docket No. 6891.
Decision and Order filed September 22, 1989.

Failure to pay when due - Agency - Apparent authority.

The Judicial Officer affirmed Chief Judge Palmer's order requiring respondent to cease and desist from failing to pay when due for livestock, suspending respondent for 28 days, unless he pays in full the amount still owed for livestock, and assessing a civil penalty of $10,000, except that the Judicial Officer suspended the civil penalty if full payment is made. Although respondent did not receive the cattle in question, and did not authorize their purchase, they were purchased by a person who previously had been authorized to purchase cattle as respondent's general agent, and respondent did not notify the market at which the cattle were purchased of the termination of the general agent's authority. Therefore respondent was liable for the purchases. Respondent's prior payment to the market in question for livestock purchased by its prior general agent over a long period of time established his apparent authority to act as a general agent for respondent. The market was not aware of any facts that should reasonably have put it on notice that the livestock purchaser was no longer respondent's agent.

Sharlene W. Lassiter, for Complainant.
Richard A. Koehler, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on November 15, 1988, by Chief Administrative Law Judge Victor W. Palmer (ALJ) ordering respondent to cease and desist from failing to pay when due for livestock, suspending respondent for 28 days, unless he pays in full the amount still owed for livestock, and assessing a civil penalty of $10,000.

On December 22, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the

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*See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1989 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).2" The case was referred to the Judicial Officer for decision on January 25, 1989.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few trivial changes and one substantive change, *viz.*, the $10,000 civil penalty will be suspended if full payment is made. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, "the Act"), instituted by a complaint filed on May 27, 1987.

The complaint alleges respondent, a dealer subject to the Act, willfully violated sections 409 and 311(a) (7 U.S.C. §§ 213, 228b), by the unfair and deceptive practice of failing to pay, when due, the full price of livestock purchased by its agent, James Olesen.

Respondent filed an answer to the complaint on June 9, 1987, in which it denied the material allegations of the complaint.

Oral hearing was held before me on May 10, 1988, in St. Paul, Minnesota. Richard A. Koehler, Geneva, Nebraska, and John T. Todd, West St. Paul, Minnesota, appeared on behalf of respondent. Sharlene W. Lassiter, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., appeared on behalf of complainant.

Briefing was completed on October 11, 1988.

Upon consideration of those briefs and the evidence of record, an order is being entered requiring respondent to cease and desist from the unfair practice of failing to pay for livestock purchased by a former general agent whose apparent authority had not been effectively terminated; suspending respondent as a registrant for 28 days unless it fully pays the balance owed with interest on account of the livestock so purchased, within 45 days from the effective date of the order; and assessing respondent a civil penalty of $10,000.

All proposed findings and conclusions not incorporated in those that follow have been rejected as lacking evidential basis, relevance or materiality.

Findings of Fact

1. The respondent, O & S Cattle Company, is a Minnesota Corporation with its principal business office located at 223 Livestock Exchange Building, South St. Paul, Minnesota 55075.

"The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

2. O & S buys and sells cattle in commerce for its own account as a dealer registered with the Secretary of Agriculture. O & S also buys cattle in commerce on a commission basis for others as a market agency registered with the Secretary of Agriculture.

3. Harold Stewart is a stockholder of O & S, serves as its treasurer and directs its day to day operations.

4. In 1983, O & S hired James Olesen as a cattle buyer and paid him $350 per week until 1984 and $500 per week in 1985 and 1986. Olesen was employed by O & S through May of 1986. O & S's last check to Olesen was dated May 8, 1986.

5. Olesen received his buying instructions from another person employed by O & S, Leland Jay Lundt. Harold Stewart would call Lundt and tell him the prices to be paid and describe the needed cattle.

6. Olesen bought cattle for O & S at Norfolk Livestock Market, Inc., where on January 4, 1985, he signed a buyer's disclosure form as buyer for O & S (Cx 4).

7. O & S circulated a letter dated January 3, 1986, stating (Cx 3):

> "We are taking this opportunity to inform you that Jay Lundt and Jim Olesen are the only buyers authorized to purchase cattle for O & S Cattle Co. If any one else should buy for us, please call for verification. Our toll free number is:
>
> 1 (800) 328-0124
>
> Please feel free to call us with any further questions. Be sure to phone in each days buy on the day of the sale or the following morning."

8. O & S on Friday, May 9, 1986, sent a letter by regular mail, dated May 9, 1986, to Spencer Livestock and to P & S stating (Cx 5):

> "Effective May 9, 1986, Jim Olesen will no longer be buying cattle on behalf of O & S Cattle Company; he has at this time taken employment elsewhere. Therefore, we will not be responsible for any purchases he makes beyond said date. Thank you for your cooperation.

9. The May 9, 1986 letter (Cx 5) listed three O & S principals: Fred O'Harrow, Ric[k] Stewart and Harold Stewart.

10. P & S received its copy of the May 9th letter on May 12, 1986 (Tr. 373-374; ALJ 5(a)).

11. Two or three days after May 9, 1986, O & S mailed the May 9th letter by regular mail, to R. Q. Lines and to Norfolk Livestock.

12. In telephone conversations, O & S had with Norfolk, in late June 1986, Norfolk denied receiving the May 9th letter. For that reason, the letter was mailed again, certified mail, to Norfolk and to two other auctions markets, Presho and Worthington. Norfolk received this letter on July 3, 1986 (Cx 5; dated notation).

13. In May and June of 1986, Olesen purchased cattle from Norfolk Livestock which were received by Leland Jay Lundt for Lundt's personal feedlot as follows (Cx [6], page 1, [Cx 7-9]; Tr. 277):

a) 141 head of cattle purchased on May 9, 198[6] for a total purchase price of $69,967.19. In payment, Norfolk received Lundt Trucking's check dated May 30, 1986 that was not honored by the bank upon which drawn.[1]

b) 112 head of cattle purchased on May 23, 1986, for a total purchase price of $49,378.95. In payment, Norfolk received Lundt Trucking's check dated June 17, 1986 that was not honored by the bank upon which drawn.

c) 131 head of cattle purchased on June 6, 1986, for a total purchase price of $56,258.52. No payment by anyone was ever tendered for these cattle.

14. On or about June 24, 1986, Lundt gave Norfolk a bill [of] sale for cattle he owned in Texas on which Norfolk realized $22,867.30. Deduction of this amount from the $175,604.66 total purchase prices in the three transactions, resulted in Norfolk being still owed approximately $152,737.[36]. O & S has refused to pay Norfolk any part of this amount.

Pertinent Statutory Provisions

Section 312(a)

It shall be unlawful for any . . . dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock. (7 U.S.C. § [213](a))

Section 409(a)

Each . . . dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price. . . . (7 U.S.C. § 228b)

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[1]It is customary for cattle sellers to accept checks in payment of purchases from persons other the one believed to be the actual buyer (Tr. 487-488).

Section 403

When construing and enforcing the provisions of this [chapter], the act, omission, or failure of any agent, officer, or other person acting for or employed [by] . . . any market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such . . . market agency, or dealer, as well as that of such agent, officer, or other person. (7 U.S.C. § 223)

Conclusions

1. O & S committed an unfair practice and violated the Act by failing to pay for livestock purchased by an unregistered subagent whose termination was not made known to the seller who customarily sold to O & S through this subagent.

A dealer employing unregistered general agents and/or subagents to buy livestock must promptly notify the sellers with whom the agents deal when employment is terminated. Until those sellers receive actual notice of the termination, the dealer is obligated to pay for any purchase ostensibly made on its behalf in accordance with the prompt and full payment requirements of the Act.

This policy is consistent with the legal principles expressed in the *Restatement of Agency* as applied by both State and Federal courts. *See Restatement of Agency 2d*, sections 3, 8, 124A, 127, 136 and 137; and cases cited in the Appendices to the *Restatement of Agency 2d*.

Section 3 of the *Restatement of Agency 2d*, defines a general agent as:

> "an agent authorized to conduct a series of transactions involving a continuity of service."

Section 8 of the *Restatement of Agency 2d*, defines apparent authority as:

> "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."

Comment *a* to section 8 points out that when there is apparent authority, a third person has the same rights against the principal as where the agent is authorized, and that this circumstance normally results from a prior relation of principal and agent.

Comment *g* to section 49 of the *Restatement of Agency 2d*, explains that:

> "the fact that an agent secretly intends to act for a purpose of his own or otherwise to disobey the principal does not prevent the existence of a power to bind the principal to one who relies upon facts which

indicate apparent authority, unless the one dealing with the agent has notice of such intent."

Section 124A of the *Restatement of Agency 2d*, states:

"The termination of authority does not thereby terminate apparent authority. . . ."

Comment *a* to this section explains:

"If before the termination of authority, . . . there was apparent authority . . ., its existence is unaffected until the knowledge or notice of the termination of authority comes to the third person. . . ."

Section 127 of the *Restatement [of] Agency 2d*, states further:

"Unless otherwise agreed, if the principal has manifested that an agent is a general agent, the apparent authority thereby created is not terminated by the termination of the agent's authority by a cause other than incapacity or impossibility, unless the third person has notice thereof."

Section 136 of the *Restatement of Agency 2d*, states:

"(1) Unless otherwise agreed, there is a notification by the principal to the third person of revocation of an agent's authority. . . .:

a) when the principal states such fact to the third person; or

b) when a reasonable time has elapsed after a writing stating such fact has been delivered by the principal

(i) to the other personally;

(ii) to the other's place of business;

(iii) to a place designated. . . .

Comment *b* to this section states:

"The requirements of Subsection (1) are not met by mailing a letter to the third person; the letter or message must reach him personally, his place of business, or other designated place; if delivered to a person there or elsewhere, it must be delivered to a person who has authority or apparent authority to receive it. . . ."

`ne final principle of the law of agency has application.
ion 137 of the *Restatement of Agency 2d*, states:

"The principles applicable to the termination of an agent's authority or apparent authority are applicable also to the termination of the authority or apparent authority of a subagent or subservant."

Comment *c* to this section explains:

"The apparent authority of a subagent is terminated in accordance with the rules stated in Sections 125-136, which deal with the apparent authority of an agent. Thus, the apparent authority of the subagent terminates when the third person has notice that the agent's authority to employ the subagent has terminated, or that the agent or the principal has revoked the subagent's authority, or that the principal has manifested dissent to the continuance of the authority, or other facts, notice of which would terminate the apparent authority of an agent. Third persons can be given notification of the termination of the subagent's authority in accordance with the rule stated in Section 136.

O & S hired Olesen in 1983, not as a special agent for a limited series of transactions, but as a general agent. Both he and O & S's other buying agent from whom he received his instructions, Lundt, were given only general instructions. They were held out to the industry as having the authority to bind O & S on cattle purchases they made for it. Both Olesen and Lundt were unregistered. Only as employees for a registrant such as O & S, would they have been permitted by the Department to buy cattle in dealer transactions. Otherwise the fiscal protection the Act seeks to give to farmers, cattlemen and others who sell livestock, would be thwarted. When a registered dealer employs unregistered livestock buyers to attend weekly auction sales and buy on its behalf, it must protect the sellers.

Here, O & S had specifically advised the industry that both Olesen and Lundt, and only Olesen and Lundt, had the authority to buy cattle for it as O & S's agents. Apparently, after Olesen had been terminated by O & S as its subagent, Lundt instructed Olesen to buy cattle for Lundt. Olesen purchased the cattle from Norfolk Livestock where he was believed to still be buying for O & S. Norfolk did not know his employment by O & S had ended. Norfolk did not receive notice of this fact until July 3, 1986, when the registered letter from O & S arrived. Both the Restatement and the purposes of the Act require, under these circumstances, that O & S pay for these cattle.

O & S, however, has decided not to pay for the cattle, and its nonpayment constitutes an unfair practice in violation of the Act. *See Cattleman's Commission Company*, 45 Agric. Dec. 234, 248 (1986).

2. **O & S should be made subject to a cease and desist order; assessed a civil penalty of $10,000; and suspended as a registrant for 28 days unless it pays the balance owed Norfolk with interest within 45 days from the effective date of the order.**

A cease and desist order to preclude O & S from failing to pay for livestock promptly is needed and should be entered.

An official who administers the Act testified and recommended that O & S also be sanctioned by being assessed a $10,000 civil penalty and suspended as a registrant for 28 days.

The recommended civil penalty is consistent with the Department's sanction policy and the severity of the violations. O & S has a net worth of $315,000 with assets in excess of one million dollars. The imposition of a $10,000 civil penalty will not jeopardize the ability of O & S to continue in business.

$[152,737] remains unpaid to Norfolk Livestock. If that amount should remain unpaid, the recommended 28-day suspension is likewise appropriate. However, O & S apparently withheld payment in the mistaken belief that it was not liable for cattle purchases made on behalf of a disingenuous general agent; cattle which O & S never received. The reasons why payment is necessary have now been authoritatively explained to O & S who should be given the opportunity to purge itself of its nonpayment. Accordingly, the suspension shall not take effect if within 45 days from the date the final order becomes effective, full payment is made by O & S to Norfolk Livestock of the balance owed, plus interest. Placing this condition on the suspension becoming effective is consistent with the Act's purpose of protecting livestock sellers.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent argues (correctly) that there is no evidence that O & S's letter dated January 3, 1986, stating that Jim Olesen is authorized to purchase cattle for O & S Cattle Company, was sent to, or seen by, Norfolk Livestock Market, Inc. But that does not change the result here. It is undisputed that Jim Olesen began buying livestock for O & S in 1983, starting at $350 a week, and, after a year or more, advanced to a salary of $500 a week (Tr. 250-53, 333-35, 345; CX 4).[2] It is also undisputed that over a period of many months, and continuing through September of 1985, respondent knew that Jim Olesen was buying cattle for it at Norfolk Livestock Market, Inc., and O & S regularly paid Norfolk Livestock Market, Inc., for such cattle (Tr. 294-96; RX 2). Respondent's payment to Norfolk Livestock Market, Inc., for livestock purchased by Jim Olesen at Norfolk Livestock Market, Inc., over a long period of time establishes Olesen's apparent authority to act as a general agent for respondent. As stated in the *Restatement (Second) of Agency* (hereafter "*Agency 2d*"), §§ 27, 43, and illus. 3 to comment *c* of § 43:

> **§ 27. Creation of Apparent Authority: General Rule**
>
> **Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third**

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[2] The citations to the record are not intended to be complete or all inclusive.

person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

. . . .

§ 43. Acquiescence by Principal in Agent's Conduct

. . . .

(2) Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.

. . . .

Comment:

c. . . . .

Illustration:

3. Every month, for three months, A purchases similar goods from T in P's name, charging them to P, who pays the bills for the first two months. At the end of the third month P dies, and A cannot be found. On these facts, it may be found that A had authority and apparent authority to make the purchases for the third month.

Respondent also argues (correctly) that Jim Olesen's apparent authority ended if Norfolk Livestock Market, Inc., had notice of facts that should reasonably have put it on notice that Jim Olesen was no longer O & S's agent. As stated in *Agency 2d*, § 9 and comments *b* and *d*, § 125 and comment *a* and comment on Clause (a), and § 135:

TOPIC 2. KNOWLEDGE AND NOTICE

§ 9. Notice

(1) A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.

. . . .

b. Use of "notice" in the Restatement. Under the definition in this Section a person has notice of a fact if he has knowledge or reason to know of it, should know of it, or has been given a notification of it; and hence it would be permissible to state that a legal result follows if a person has notice of a fact, although the result would follow only if the

person were to have knowledge of the fact, or would follow only if the person were to have reason to know of the fact. In the Restatement, however, for purposes of clarity, where it is stated that a legal result follows if a person has notice of a fact and there is no qualification in the Comment or otherwise, it means that the result follows if such person, in the alternative, has knowledge of the fact, or reason to know of it, or should know of it, or has been given a notification. When only knowledge has the effect stated, the word "knowledge" is used; likewise, where, to constitute notice, it is necessary that the person have reason to know of the fact, that he should know of it, or that he should receive a notification, the particular requirement is stated.

. . . .

d. Reason to know. A person has reason to know of a fact if he has information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence. The inference drawn need not be that the fact exists; it is sufficient that the likelihood of its existence is so great that a person of ordinary intelligence, or of the superior intelligence which the person in question has, would, if exercising ordinary prudence under the circumstances, govern his conduct as if the fact existed, until he could ascertain its existence or non-existence. The words "reason to know" do not necessarily import the existence of a duty to others to

. . . .

TOPIC 2. TERMINATION OF APPARENT AUTHORITY

§ 125. By Notice of Termination of Authority, or of Principal's Consent, or of a Basic Error

Apparent authority, not otherwise terminated, terminates when the third person has notice of:

(a) the termination of the agent's authority;

(b) a manifestation by the principal that he no longer consents; or

(c) facts, the failure to reveal which, were the transaction with the principal in person, would be ground for rescission by the principal.

Comment:

a. . . . Ordinarily, the power of one who has been held out to third persons as a general agent terminates only when such persons have notice that the principal no longer intends him to act; on the other hand, the apparent authority of one who is held out as a special agent ordinarily terminates when his authority terminates. See §§ 127, 132.

Apparent authority terminates when the third person has notice that the agent's authority has terminated (see Comment *b*), or that, whether or not the agent's privilege to act has terminated, the principal no longer consents that the agent shall deal with him (see Comment *c*), or that the agent is acting under a basic error as to the facts. See Comment *d*.

Comment on Clause (a):

b. Apparent authority can exist only as long as the third person, to whom the principal has made a manifestation of authority, continues reasonably to believe that the agent is authorized. He does not have this reasonable belief if he has reason to know that the principal has revoked, or that the agent has renounced the authority, or that such time has elapsed or such events have happened after the authorization as to require the reasonable inference that the agent's authority has terminated. . . .

. . . .

> **A third person to whom a principal has manifested that an agent has authority to do an act has notice of the termination of authority when he knows, has reason to know, should know, or has been given a notification of the occurrence of an event from which, if reasonable, he would draw the inference that the principal does not consent to have the agent so act for him, that the agent does not consent so to act for the principal, or that the transaction has become impossible of execution.**

However, Norfolk Livestock Market, Inc., was not aware of any facts that should reasonably have put it on notice that Jim Olesen was no longer O & S's agent. Harold Stewart, who directs O & S's operations, testified that he told Jay Lundt, through whom Jim Olesen received directions from O & S, that Jim Olesen was to stop buying livestock for O & S at Norfolk in September of 1985 (Tr. 295-96). But that information was not received by Norfolk Livestock Market, Inc., until late June of 1986 (Finding 12). Furthermore, Harold Stewart continued to pay Jim Olesen his full salary until May 9, 1986, even though he knew that Jim Olesen was continuing to buy livestock at Norfolk's Friday sales, during the period from September of 1985 until June of 1986 (Tr. 345-51).[3]

Respondent relies on the fact that after September of 1985, when Jim Olesen purchased livestock at Norfolk Livestock Market, Inc., payment was made to Norfolk by someone other than O & S. But that change in payment arrangements was not sufficient to place Norfolk on notice that Jim Olesen was no longer a general agent of O & S at Norfolk, since Norfolk's manager reasonably thought that the persons making payment after September of 1985, for cattle bought by Jim Olesen, e.g., Pine Valley Meats, Inc., Vienna Sausage, and Lundt Trucking, were the ultimate customers of O & S (Tr. 241-42), and it is not uncommon in the Nebraska area for the ultimate purchaser to pay the auction market directly for livestock purchases made by an agent (Tr. 132, 150, 163, 242).

In addition, the fact that beginning May 23, 1986, Norfolk Livestock Market, Inc., issued commission checks ranging from $300 to $500 to Jim Olesen in connection with Olesen's purchases for Pine Valley, Meats, Inc. (Tr. 435-41; RX 10), was not sufficient to place Norfolk Livestock Market, Inc., on notice that Olesen's agency with O & S had terminated, since it is not unusual for a livestock buyer to work for more than one principal.

Furthermore, the fact that payment for some of Olesen's livestock purchases made at Norfolk were as much as several weeks late was not sufficient notice of facts that should have prompted Norfolk Livestock Market, Inc., to question Olesen's authority, since (unfortunately) it is not a rare event for livestock purchasers not to pay promptly as required by the Act and

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[3]Presumably Harold Stewart countenanced Jim Olesen's purchases at Norfolk after September of 1985 because Jim Olesen was buying livestock at Norfolk for Harold Stewart's brother, Rick Stewart, who was the cattle procurement manager for Pine Valley Meats, Inc.

regulations. For example, in *In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. ____, slip op. at 18 (Mar. 14, 1989), involving a custodial account violation by an auction market, the auction market complained (to no avail) that its violations were caused by the failure of buyers to pay promptly for their livestock. As stated in that case (*id.*):

> Respondents argue that their custodial account shortages resulted from buyers failing to pay them promptly for livestock. However, since January 1, 1968, auction market operators have been required to have sufficient capital to put their own money into the custodial account if buyers fail to pay them promptly (see *Rodman*, Appendix A at 17-22). In fact, prior to August 30, 1982, auction market operators were required to put their own money into the custodial account to cover all proceeds receivable on or before the third day following the sale of consigned livestock. Since August 30, 1982, they have 7 days in which to do so. If an auction market operator does not know that the buyer from his sale will pay promptly for livestock purchased from the sale, the operator can demand immediate payment on the day of the sale (see 7 U.S.C. § 208). Whether to trust a buyer to pay promptly is a business judgment that must be made by all auction market operators.

Respondent relies on the fact that Norfolk Livestock Market, Inc., attempted to obtain payment for the livestock involved in this case from others before attempting to obtain payment from respondent. But that fact is of no consequence here. Norfolk thought that O & S was merely an agent buying for the ultimate purchasers, and it is not unusual to attempt to obtain payment from the ultimate purchasers, before attempting to obtain payment from an agent.

Complainant has applied no new principles against respondent in this case. Complainant has merely applied the well-recognized principles of agency, which impose liability on a principal who fails to notify a third person of the termination of a general agent's authority. Although the result in this case is harsh, if the law of agency were otherwise, it would even be more harsh from the viewpoint of innocent third persons. As stated in *Agency 2d*, § 8A, comments *a* and *b*, and § 161, comment *a*, as to an analogous situation (inherent agency power):

> The principles of agency have made it possible for persons to utilize the services of others in accomplishing far more than could be done by their unaided efforts. Although the agency relation may exist without reference to mercantile affairs, as in the case of domestic servants, its primary function in modern life is to make possible the commercial enterprises which could not exist otherwise. . . . It is inevitable that in doing their work, either through negligence or excess of zeal, agents will harm third persons or will deal with them in unauthorized ways. It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. The answer of the common law

has been the creation of special agency powers or, to phrase it otherwise, the imposition of liability upon the principal because of unauthorized or negligent acts of his servants and other agents. These powers or liabilities are created by the courts primarily for the protection of third persons, either those who are harmed by the agent or those who deal with the agent. In the long run, however, they enure to the benefit of the business world and hence to the advantage of employers as a class, the members of which are plaintiffs as well as defendants in actions brought upon unauthorized transactions conducted by agents.

. . . .

. . . But because agents are fiduciaries acting generally in the principal's interests, and are trusted and controlled by him, it is fairer that the risk of loss caused by disobedience of agents should fall upon the principal rather than upon third persons.

. . . .

. . . In the situations in which an agent's powers exist only because of the rule stated in this Section, the principal's liability cannot be based upon the rules of contracts, of torts, or of restitution since, by hypothesis the principal has not communicated with the third person by any authorized means; he has committed no wrong which can be classified as a tort, and he has not been unjustly enriched. His liability exists solely because of his relation to the agent. It is based primarily upon the theory that, if one appoints an agent to conduct a series of transactions over a period of time, it is fair that he should bear losses which are incurred when such an agent, although without authority to do so, does something which is usually done in connection with the transactions he is employed to conduct. Such agents can properly be regarded as part of the principal's organization in much the same way as a servant is normally part of the master's business enterprise. In fact most general agents are also servants, such as managers and other persons continuously employed and subject to physical supervision by the employer. The basis of the extended liability stated in this Section is comparable to the liability of a master for the torts of his servant. See Comment *a* on § 219. In the case of the master, it is thought fair that one who benefits from the enterprise and has a right to control the physical activities of those who make the enterprise profitable, should pay for the physical harm resulting from the errors and derelictions of the servants while doing the kind of thing which makes the enterprise successful. The rules imposing liability upon the principal for some of the contracts and conveyances of a general agent, whether or not a servant, which he is neither authorized nor apparently authorized to make, are based upon a similar public policy. Commercial convenience requires that the principal should not escape liability where there have

been deviations from the usually granted authority by persons who are such essential parts of his business enterprise. In the long run it is of advantage to business, and hence to employers as a class, that third persons should not be required to scrutinize too carefully the mandates of permanent or semi-permanent agents who do no more than what is usually done by agents in similar positions.

Nonetheless, in view of the harshness to respondent resulting from applying the principles of agency to this case, I am mitigating the sanction, by relieving respondent of the obligation of paying the civil penalty if full payment is made to O & S for the livestock involved in this proceeding.

I had originally intended to hold this decision until the Presiding Officer completed the reparation order in *Norfolk Livestock Market, Inc. v. O & S Cattle Company*, P&S Docket No. 6771, but that decision has not yet been forwarded to me. In order to prevent further delay, I am issuing this Decision and Order at this time. In addition, the Decision and Order in this case must be based on the record of this case, and the Decision and Order in the reparation case must be based on a different record made by the private litigants in that case.

For the foregoing reasons, the following order should be issued.

Order

Respondent O & S Cattle Company, its officers, directors, agents and employees, successors and assigns, directly or through any other corporate device, shall cease and desist from:

1. Failing to pay, when due, for livestock purchased; and

2. Failing to pay for livestock purchased.

Respondent O & S Cattle Company is suspended as a registrant under the Act for a period of 28 days, starting on the 46th day after service of this order on respondent, unless within 45 days after service, it pays in full the amount still owed plus interest, at the rate of 13%, to Norfolk Livestock Market, Inc., for the cattle purchases specified in Finding 13.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent O & S Cattle Company is assessed a civil penalty in the amount of $10,000, unless within 45 days after service, it pays in full the amount still owed plus interest, at the rate of 13%, to Norfolk Livestock Market, Inc., for the cattle purchases specified in Finding 13. If the civil penalty becomes payable, it shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Room 2446, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 46th day after service of this order on respondent.

The cease and desist provisions of this order shall become effective on the day after service of this order.

In re: O & S CATTLE CO.
P&S Docket No. 6891.
Stay Order filed October 26, 1989.

Sharlene W. Lassiter, for Complainant.
Richard A. Koehler, for Respondent
Stay Order issued by Donald A. Campbell, Judicial Officer.

The civil penalty and suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

In re: EMBRY LIVESTOCK CO., INC., CLARENCE SWALVE, DARWIN KOEHLER, RUSS MOHN, DALE CARLSON AND RON JENKINS.
P&S Docket No. D-88-31.
Decision and Order filed September 22, 1989.

Agency - Dealer - Duty to disclose - Market agency.

Respondents, charged with failure to disclose the difference between markup between the cost of animals and the $.35 per hundredweight charged, claimed they were dealers rather than buying agents and therefore had not duty to disclose. In order to find agency status, one must determine that the alleged principal's actions make it obvious that another was empowered to act for him, that the alleged agent's actions show that he consented to so act, and that the facts support an understanding between the parties that the alleged principal was in control. Complainant's contention that the respondents received commissions for their sales is not determinative of an agency relationship. "Dealer" status is commonly afforded to those who resell livestock and add on a charge of some kind that is not a true commission. In order for there to be a true "commission" as used in the Packers and Stockyards Act, there must be (1) a fee paid (2) to an agent (3) for transacting business. A "service charge", such as the ones respondents charged, does not equal a commission.

Allan R. Kahan, for Complainant.
Ernest H. Van Hooser and Daniel G. O'Day for Respondents.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter sometimes referred to as the "Act," instituted by a Complaint filed on January 7, 1988, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that Respondent Embry Livestock Company, Inc., under the management, direction, and control of Respondents Clarence Swalve, Darwin Koehler, Russ Mohn, Dale Carlson and Ron Jenkins purchased livestock on a commission basis for various packer principals and in accounting to its principals for such livestock prepared and submitted nvoices showing falsely increased prices as the purchase prices of the livestock

and that said Respondents collected from the various principals on the basis of such falsely increased prices, in addition to collecting its buying commission. The Complaint also alleges that the Respondents made copies of such false and incorrect invoices a part of the corporate Respondent's accounts and records.

On February 8, 1988, Respondents Darwin Koehler, Russ Mohn and Ron Jenkins filed an Answer to the Complaint in which they generally admitted the jurisdictional allegations; denied that they managed, directed and controlled Embry Livestock Company, Inc.; denied that they were engaged in the business of buying livestock as the agent of packers or purchasers; and denied the substantive allegations of the Complaint.

On February 8, 1988, Respondents Clarence Swalve, Dale Carlson and Embry Livestock Company, Inc., filed separate Answers in which they generally admitted the jurisdictional allegations of the Complaint; denied that the individual Respondents managed, directed and controlled Embry Livestock Company, Inc.; denied that they were engaged in the business of buying livestock on a commission basis; and denied the substantive allegations of the Complaint.

Subsequently, Respondents Clarence Swalve, Dale Carlson and Embry Livestock Company, Inc., amended their respective Answers to affirmatively allege that the Complainant failed to abide by the provisions of 5 U.S.C. section 558(c) relating to notice.

By reason of such allegations the Respondents are alleged to have violated sections 312(a) and 401 of the Act (7 U.S.C. §§ 213(a), 221) and section 201.44 of the regulations (9 C.F.R. § 201.44).

The issue in this proceeding is whether or not the Respondents engaged in unfair and deceptive practices in violation of the Act. The resolution thereof is dependent upon a determination of whether or not the Respondents were buying or selling on a commission basis, or, on a dealer basis. If the Respondent, Embry Livestock Company, Inc. ("Embry Livestock") had an *agency relationship* with those who obtained the cattle from such entity, then, there was an obligation to disclose the difference in the mark-up between the cost of the animals and the 35¢ per hundredweight which was charged. However, if there was a *dealer relationship* then, no such obligation resided with the Respondents. Ancillary to the principal issue is the extent to which, if any, the individual employees played a role in the management of the day-to-day operations of the corporate Respondent.

An oral hearing was held December 6 through the 9th, 1988, in Peoria, Illinois, before Administrative Law Judge Dorothea A. Baker. Respondents Embry Livestock Company, Inc., Clarence Swalve, and Dale Carlson were represented by Ernest H. Van Hooser, Esquire, Van Hooser, Olsen, & Parkinson, P.C., 9233 Ward Parkway, Suite 375, Kansas City, Missouri 64114. Respondents Darwin Koehler, Russ Mohn and Ron Jenkins were represented by Daniel G. O'Day, Esquire, Sutkowski & Washkuhn, 560 Jefferson Bank Building, Peoria, Illinois 61602. Complainant was represented by Allan R. Kahan, Esquire, and Jane McCavitt, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250.

Complainant called twelve witnesses and offered twenty-four exhibits. Respondents called fourteen witnesses and offered fifteen exhibits. The transcript of the hearing comprises 925 pages. In due course the parties filed briefs, with the brief on behalf of the Respondents Embry Livestock, Clarence Swalve, and Dale Carlson being filed April 3, 1989, consisting of 41 pages, the brief on behalf of Respondents Koehler, Mohn and Jenkins, being filed April 4, 1989, and consisting of 62 pages, and the Complainant's initial brief consisting of 37 pages and its reply brief consisting of 14 pages, the latter of which was filed on May 1, 1989. On August 7, 1989, counsel for Embry Livestock Company, Inc., Clarence Swalve, and Dale Carlson, filed a Motion for Leave to supplement its brief submission by adding the citation thereto of the recent case of: *Western States Cattle Co., et al. v. U.S. Department of Agriculture* (8th Cir., July 24, 1989, Case No. 88-2179). Complainant filed no opposition to said Motion and it is granted. Furthermore, it is a matter of which official notice can be taken.

Findings of Fact

1. Embry Livestock Company, Inc., hereinafter sometimes referred to as "Embry Livestock" is a corporation whose business address is P. O. Box 99706, Louisville, Kentucky 40206.

2. The corporate Respondent, Embry Livestock Company, Inc., is and, at all times material herein, was:

(a) engaged in the business of buying and selling livestock in commerce for its own account; and,

(b) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy livestock in commerce on a commission basis.

3. The corporate Respondent, Embry Livestock, has never filed a tariff to operate as a market agency buying on commission at the Peoria Union Stockyards; it did file a tariff to operate as a market agency buying on commission for its operation at the Bourbon Stockyards, Louisville, Kentucky, the latter of which is not involved in this proceeding.

4. Clarence Swalve, hereinafter sometimes referred to as Respondent Swalve, is an individual whose mailing address is 6330 Upland Terrace, Peoria, Illinois 61615. Respondent Swalve is, and as herein pertinent, and, at all times material herein, was:

(a) an employee of and hog buyer for the corporate Respondent and was regarded by some as the "head" hog buyer; and, he

(b) engaged in the business of a dealer buying and selling livestock in commerce as the agent or employee of the corporate Respondent.

With respect to the Complainant's assertion that Mr. Swalve was the head hog buyer there appears to be no substantial basis for that title other than that Mr. Swalve was the one to whom other employees would look for the purpose of trying to resolve day-to-day problems. However, Mr. Swalve, a high school graduate, did not have the capacities nor authority to determine who would be customers of the corporate Respondent nor was he in a position to determine matters of policy. He received directions and orders through his daily, direct, contact with Mr. Embry of the corporate Respondent. Although Mr. Swalve, together with the other individual Respondents, did engage in work activities on a day-to-day basis, this was what they were being paid to do and what was expected of them. They were employees of the corporate Respondent and took direction therefrom.

5. Darwin Koehler, hereinafter sometimes referred to as Respondent Koehler is an individual whose mailing address is 9412 Park School Road, Princeville, Illinois 61559.

6. Respondent Koehler is, and, at all times material herein, was:

(a) an employee of and a hog buyer for the corporate Respondent; and,

(b) engaged in the business of a dealer buying and selling livestock in commerce as the agent or employee of the corporate Respondent.

7. Russ Mohn, hereinafter referred to as Respondent Mohn, is an individual whose mailing address is 2133 West Laurel, Peoria, Illinois 61604.

8. Respondent Mohn is, and, at all times material herein, was:

(a) an employee of and a hog buyer for the corporate Respondent; and,

(b) engaged in the business of a dealer buying and selling livestock in commerce as the agent or employee of the corporate Respondent.

9. Dale Carlson, hereinafter referred to as Respondent Carlson, is an individual whose mailing address is Route 1, Edwards, Illinois 61528.

10. Respondent Carlson is, and, at all times material herein was:

(a) an employee of and hog buyer for the corporate Respondent; and,

(b) engaged in the business of a dealer buying and selling livestock in commerce as the agent or employee of the corporate Respondent.

11. Ron Jenkins, hereinafter referred to as Respondent Jenkins, is an individual whose mailing address is Route 2, Brimfield, Illinois 61517.

12. Respondent Jenkins is, and, at all times material herein, was:

(a) an employee of and a hog buyer for the corporate Respondent; and,

(b) engaged in the business of a dealer buying and selling livestock in commerce as the agent or employee of the corporate Respondent.

13. The Complainant's contention that the individual Respondents were in charge of the operations of the corporate Respondent and did, at all times material herein, formulate, direct and control the policies, practices and day to day activities of Embry Livestock is not justified by the evidence herein. Although the Complainant maintains that Mr. Swalve is the Respondent, among the individual Respondents, whom the Department believes the most culpable, this contention likewise is not supported by persuasive evidence.

14. Each of the employees of the corporate Respondent testified on his own behalf. Among other things, it was clear from the testimony and it was uncontroverted, that said individuals were regarded as employees of the corporate Respondent with respect to withholding taxes and other matters. In addition to salary, they also participated in what was referred to as a profit sharing arrangement. This was not a true profit sharing arrangement, but rather, it was how four of the individual Respondents were paid. Instead of being on a fixed salary, with a bonus based on the company's profitability, such as was the case with Mr. Pille, the bookkeeper, the four individual Respondents drew against the available money and settled up on a periodic basis. Generally speaking, their entire remuneration was approximately $17,000 per year for each individual Respondent, although there may have been some variances among them. It is further evident from their testimony that although each of the individual Respondents had individual accounts which they serviced, said employees were not directly or indirectly related to the management of the corporation, and were not in a position to make managerial decisions. For the most part these individuals had high school educations and although skilled in hogs, they, nevertheless, were not in a position to do much more than relate to the prospective purchasers, the numbers and types of hogs available, and the prices sought at a given time.

15. The corporate Respondent is owned through a trust arrangement. The principal share holders and owners of the corporation testified at the oral hearing. The employees were not directly involved in office management, nor did they act as Officers or Members of the Board of Directors, the latter of which includes individuals not associated with the family ownership. Both of the Embry witnesses (Mr. Harry Embry and Mr. Foster Embry) indicated through their testimony that they maintained management control over the operations of the corporate Respondent. In addition, there was daily contact, particularly with Respondent Swalve, with respect to the operations of the hog selling. This was a normal employer-employee relationship. Since the individual Respondents were the ones who negotiated the sales agreements with the packers, such information was given to Embry's office manager so that invoices could be prepared and sent to the packers-purchasers. This does not equate with management, direction, and control; otherwise, one would be forced to argue that most companies in this country are managed by those companies' salesmen. With a view to fiscal responsibility, only the owners of the corporation could approve of new customers, except for very small accounts.

16. On February 22, 1983, a decision of the Secretary of Agriculture was entered with respect to the corporate respondent in P. & S. Docket No. 6100, which, in relevant portion, ordered the corporate respondent, its officers,

directors, agents, and employees, in connection with its operation subject to the Packers and Stockyards Act, to cease and desist from: (1) misrepresenting to its principals (a) the original purchase price for livestock purchased on a commission basis; or (b) the nature of the charges made for its services; (2) preparing and issuing or causing to be prepared and issued in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings or any document showing false, inaccurate, or misleading price entries for such livestock; (3) collecting payment from the purchasers of livestock on the basis of false, inaccurate or misleading price entries on accounts of purchases, invoices or billings; and (4) inserting or failing to insert in accounts of purchases, invoices, billings, or any other documents prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading report of such livestock purchase or sale transaction.

17. The aforesaid consent decree grew out of Embry Livestock's *earlier* accounting practices. Embry Livestock was operating on a dealer basis but allegedly it had invoicing problems possibly leading packers to believe that Embry Livestock was operating as a market agency rather than a dealer. This uncertainty was attempted to be resolved prior to entry of the 1983 decision.

Prior to the aforesaid consent decision being issued in 1983, a meeting was held in the office of Mr. James Smith, the Deputy Administrator of the Packers and Stockyards Administration. Those present at that meeting were Mr. Davis, Mr. Smith, and Mr. Allan Kahan from the Office of the General Counsel, in addition to Mr. Foster Embry, and Mr. Len Whittock who at that time was in charge of the National Stock Yards, Illinois (Tr. 847).

18. Mr. Thompson, who in the spring of 1982, occupied the position of Assistant Area Supervisor of the Springfield office verified that the corporate Respondent was and sought to operate on a dealer basis. In describing a meeting which took place in 1982 with the corporate owners and directors, Mr. Thompson replied with respect to the discussion at the meeting:

> A. ***One of the questions that I asked early on of Harry Embry and Mrs. Tyler was I asked if they were going to operate as a commission agent buying on commission because, "If you are, I need to take a tariff statement from you subscribing from the current tariff at the Peoria Yards and need to amend your registration to show that you would operate as a market agency buying on commission at Peoria."
>
> Both of them answered me emphatically, No. We do not intend to operate as such. We're going to operate as a dealer at this location. So that negated the need for any change in their registration.
>
> Q. If I understand correctly, Embry did not file a tariff to operate at Peoria Union Stock Yards?
>
> A. No, they did not. (Tr. 770).

19. It was not crystal clear in the industry nor the Agency itself as to those matters which would clearly distinguish an order buyer or commission agent from a dealer.

20. The testimony of a former Assistant Area Supervisor for the Packers and Stockyards Act, one of the Agency's own investigators, and of the packers themselves, clearly demonstrates that there was confusion within the Agency and within the industry as to order buyers versus dealers and service charges versus commissions. (See Tr. 788, 790, 105).

21. That there was confusion within the Agency and among the packers with respect to the terms "dealer", "order buyer" and "commission agency" is confirmed by the testimony of Mr. Raymond Thompson who, although retired at the time of his testimony, worked for 23 years with the Packers and Stockyards Administration from 1961 until 1984. Included in his testimony was the following:

> Q. Based on your experience with the Packers and Stockyards Administration, during the period while you were in the Chicago and Springfield offices, did you find in the conduct of your investigations and reviewing the investigatory files, and in your conversations with employees with the Packers and Stockyards Administration whether there were any misunderstandings regarding the terms "dealer" and "order-buyer"?
>
> A. There has always been a degree of confusion with respect to the order buying. A dealer is commonly known as a person who buys and sells for his own account. The extension of order-buying to the term "dealer order-buyer" raises a lot of confusion, yes.
>
> Q. Again, based on your experience as an employee of the Packers and Stockyards Administration while you were there, do you know whether or not the term "order-buyer" is defined anywhere in the Packers and Stockyards Act or in the regulations?
>
> A. Not that I know of. In fact, it's not.
>
> Q. The confusion that you just testified to, is that in the industry or is that in the Packers and Stockyards Administration?
>
> A. Both. (Tr. 788-789).

22. Notwithstanding certain testimony to the effect that there was no confusion nor uncertainty regarding the use of "service charges" versus commissions except possibly in the area covered by the Indianapolis, Indiana, regional office (which also includes Illinois) there is further evidence to the contrary in the form of an internal 1949 memorandum more specifically discussed, *infra*.

23. In any event, there is credible evidence that there was the existence of ambiguity with respect to an agency relationship and a dealer relationship, and the manner of invoicing, with respect to the Indianapolis area.

24. In anticipation of the hearing in the instant case, the Packers and Stockyards Administration conducted a search of its archives. The search produced a memorandum written in 1949 addressing the issue of "service charges" and "contract additions" by livestock dealers. It was testified to by the Director of the Packers and Stockyards Livestock Marketing Division that this memo set forth the *policy of the agency* which was in existence at the time of the hearing. The memo in question was signed by the Chief of Packers and Stockyards in 1949. In the second paragraph, the Chief of the Packers and Stockyards discussed the packers' preference for having dealers break out "service charges" or "contract additions" separately on the dealers' invoices rather than merely including them as part of the actual purchase prices of livestock. In the first, second and third paragraphs, the Chief expressed the conclusions that these terms should be eliminated from invoices altogether. According to the Chief's memo, a dealer may not, when invoicing, list a "service charge" or "contract addition" or "mark-up" separately. Rather, the Chief said in the fourth paragraph of his memorandum, the invoice should reflect the specific sales prices. According to this view, a livestock dealer, when invoicing his customers, is obliged to include all mark-ups in the price listed as the sales price on the invoice. The Chief's memorandum also provided that dealers' invoices should be headed "Livestock Dealer" and that they should carry the term "Sold to".

The overall import of the Chief's memorandum was that, if the Chief's suggestions were followed, dealers' invoices would not be regarded as misleading off-the-market buyers into believing that the dealers were acting as market agencies buying on a commission basis. Another critical component of the Chief's memorandum is that it discusses dealers as remaining "dealers" despite the assessment of a mark-up referred to either as a "service charge" or a "contract addition." *In other words, the memo does not contend that a dealer is somehow transformed into a market agency on account of the assessment of a standard mark-up, service charge, or contract addition.* Rather, the memorandum's position is that the dealer remains a dealer, but that packers may be misled into believing the dealer is a market agency if the component is set forth separately on the dealer's invoice.

25. The notion that dealers may mark-up the price to reflect such a charge is reinforced by the Act, which in no way places any limits on how dealers arrive at their prices. The applicable regulations, likewise, impose no limitations on charges by dealers to purchasers. The regulations only prevent dealers from collecting a service charge from a seller of livestock. P&S Regulation, section 201.98.

26. Embry Livestock's accounting practices before the 1983 consent decree and during the early stages of its operations in Peoria, were not, in all respects, consistent with the policy established by the Packers and Stockyards Chief's 1949 memorandum. It should be noted that the matters set forth in

the aforesaid 1949 memorandum have never been published or subject to rule making. It was an internal memorandum[1] to all supervisors from the Chief of the Packers and Stockyards Act, as far back as 1949, regarding the confusion that the Agency believed resulted from the use of the term "service charge" by dealers. Although a recommendation was forwarded to responsible Agency employees as to how the confusion with respect to order buying and dealing transactions and with respect to service charges could be corrected, it was concluded that any problem that existed or any confusion that existed was one limited to a small region and was not a national problem and one that did not warrant going through a rule making procedure to deal with. (Tr. 856). The Agency did not issue any remedial regulations that would address or attempt to clarify this issue; the Agency also did not issue any policy statements that would attempt to clarify the issue nor even instruct its regional offices to try to clarify this issue for the industry. (Tr. 901-902). Also, despite the conferences which existed between Agency personnel and the corporate Respondent, both preceding and after the 1983 consent decision, a copy of such memorandum, or the substance set forth therein, was never made available nor given to the Respondents herein.

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[1]The memorandum to all supervisors indicated, among other things, that for several years dealers registered under the Act were permitted, in accounting "off-the-market" to whom they sold livestock, to assess such buyers a "service charge". It was indicated that this charge was originally intended to cover services furnished by the dealers in supervising loading and shipping of livestock sold by the dealers to off-the-market buyers It is further stated: "We believe that the term 'service charge' was misleading, since its use on dealers' invoices carried an implication that the dealers were acting in some sort of an agency capacity for off-the-market buyers whereas in fact, the dealers were merely selling them livestock."

* * * * *

"***At such conference it was agreed that the term "service charge" would be eliminated from invoices issued by *** "after having several months experience with the use of 'contract addition' on dealers' invoices, we have reached the conclusion that it is as misleading as the earlier term 'service charge'. In fact, many off-the-market buyers, we believe, are under the impression that dealers are acting in some agency capacity in furnishing them livestock and that the dealers receive for their services only the contract addition. We are now taking the position, therefore, that all such terms should be eliminated from dealers' invoices to buyers.

"We are asking all district supervisors to assist us in assembling information which will support actions, either informal or formal, by the division to eliminate the use of such terms as "service charge" or "contract addition" on billings or invoices issued by dealers. All such invoices in our opinion should be headed "livestock dealer" rather than "livestock buyer" and should carry the term "sold to" rather than such misleading terms as "bought for, shipped to, account of, etc." In order to avoid any misunderstanding on the part of off-the-market buyers who purchase from dealers, we believe dealers' invoices should merely show the species sold, the number of head and weight of the animals, and the specific sales prices."***

It will be noted that the avenue to be pursued by the Packers and Stockyards was not rule promulgation or publication of its memorandum, but rather, the gathering of data to bring formal or informal actions.

27. An example of Embry Livestock's *earlier* invoicing practices at its Peoria Stockyards location was admitted into evidence as Complainant's Exhibit 22 and has been attached to the Complainant's brief as Appendix 1. Inconsistent with the directions of the Chief's memorandum, Exhibit 22 sets forth a service charge of $149.88 separately on the invoice. The invoice was not headed "Livestock Dealer" and there was no use of the term "Sold to." Embry Livestock discontinued this form of invoicing. After the 1983 Consent Decree Respondent Embry Livestock presented a revised invoice form to officials of the Packers and Stockyards Administration, and those officials not only failed to comment, but refused to comment regarding the revised invoice format. Absent any substantive guidance from the Agency, corporate Respondent Embry Livestock took numerous steps to insure that its packer customers knew that Embry Livestock was conducting business on a dealer basis. For example, it changed its invoice form; it changed the sign on its door; and it specifically notified all of its packer customers that it was conducting business on a dealer basis and had changed its billing procedures accordingly. The government's own investigator, Mr. Reilly, concluded that the Respondents were truthful in stating that they had contacted and notified the corporate Respondent's packer customers and had advised them of the change in the invoicing and that the corporate Respondent was operating as a livestock dealer. (Tr. 276-277).

28. The Complainant maintained that these acts[2] by the corporate Respondent were not enough and that they were deceiving their customers.

Although exact conformance with the requirements of the 1949 unpublicized memorandum may not have been achieved, the corporate Respondent intended and did operate as a dealer. Its customers were not deceived.

29. The Embry Livestock employees testified, and their testimony is accorded full credence, that their notification to the packer customers contained two distinct elements: one, that Embry Livestock was conducting business on a dealer business and two, that Embry Livestock was changing its billing procedures accordingly. The packers who testified indicated for the most part that they were concerned with the bottom line, i.e., what it cost them to get the hogs they wanted. Thus, there were those who could not

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[2]Complainant's dissatisfaction with Embry Livestock's invoicing may be of its own making. Complainant attached a copy of Exhibit 22, as Appendix 1, to its brief as an example of the invoices Embry sent to its packer customers. However, it must be noted that said attachment to the Complainant's brief (as Appendix 1) reveals that the invoice is dated January 3, 1983 - a date before P&S Docket 6100 was ever filed, before Embry Livestock revised its invoices, before Embry Livestock notified its packer customers that it was conducting business as a dealer; a date approximately two and a half years before the transactions in the present case. The invoice used by the corporate Respondent during this earlier period was an invoice which had been used by the predecessor firm, Sitton, Cotts and Sword. Sitton, Cotts and Sword, in addition to selling livestock on a dealer basis, purchased livestock on a commission basis for various principals. Said invoice of January 3, 1983 does show identifications for commission firms in the "brought from column," however, the invoices in the case at bar do not show anything at all in that column. Embry Livestock's new invoicing methods followed most, if not all, of the 1949 memo requirements, even though Embry Livestock had not seen the Chief's 1949 memo.

remember whether the conversations focused on the money element rather than Embry's statement that it was conducting business as a dealer.

30. It was the intent and belief of the Respondents that Embry Livestock was conducting business as a dealer. Embry Livestock took title to the hogs it purchased from the commission firms at the Peoria Union Stockyards. The corporate Respondent bore the risk of loss from the time the hogs came off the stockyards scales until the hogs were shipped to the packer - and in some cases until the hogs crossed the packers' scales and the packer made a determination regarding in-transit shrink.

31. By exercising their right of rejection and making adjustments to the invoiced price of hogs that did not conform to the agreement, the packers treated the transactions as typical sale transactions under the Uniform Commercial Code rather than agency transactions. Although some of the packers indicated they were under the impression that Embry was purchasing hogs on an agency basis, as indicated in their testimony, some of the packers believed they were purchasing hogs from Embry on a dealer basis.

32. On numerous occasions Embry sold hogs for less than it paid for such hogs. As a normal practice, Embry purchased hogs early in the morning and spent the rest of the day trying to sell those hogs, and sometimes wound up owning such hogs for one, two or three days before they were sold.

33. Having price breaks of $.35 and $.85, having multiple line entries on invoices and providing scale tickets to packers do not make the transactions in this case agency transactions.

34. The corporate Respondent, Embry Livestock, did not deceive the packers in this case. It had notified its packer customers that it was conducting business as a dealer. Embry Livestock invoices, which went with every group of hogs, displayed the legend "Livestock Dealers". In addition, Embry Livestock sent the scale tickets along with the invoices.

35. Of the nine packer buyers who testified, four stated unequivocally that they understood they were purchasing hogs from Embry Livestock on a dealer basis. Of the five who testified otherwise, four based their belief that Embry was a commission agent on assumption - and on the fact that Embry was located at a terminal stockyard and two of the five testified they assumed Embry Livestock was a commission agent but never discussed their respective company's relationship with Embry with the previous buyer - and the only evidence showed that Embry had previously been doing business with their respective companies on a dealer basis.

36. Notwithstanding the preciseness by which the Complainant examined witnesses, with a view to distinguishing between a commission basis/agency relationship and a dealer relationship, nevertheless, the fact remains that this distinction is not always clearly reflected in the thought processes of the packers. Therefore, when they take the witness stand and are questioned about what they thought or how the hogs were acquired, frequently the differentiating factors which enter into the differences in relationship are not fully appreciated. The purchasing representatives of the packers at the oral hearing testified in varying respects to their impression of the transactions applicable to them. Universally, such packers indicated that before purchasing their hogs they would call up the corporate Respondent (or vice versa), they

would discuss current market charges, the quality and quantity of the livestock available, their respective needs, and *accordingly agree and enter into a contract for the purchase of a designated amount of livestock at a particular price.* It should be noted that these packer witnesses are extremely knowledgeable individuals and would hardly be purchasing the large volumes which they did on a continuing basis at greater than the amount they thought was applicable. If these individual packer purchases were off by even a small amount, it would be very quickly discerned, because of the expertise of these individuals and others associated with the industry and their knowledge of purchasing practices and prices.

37. Based upon the record as a whole, there is a lack of credible and substantial evidence of an agency relationship between Embry Livestock and a packer, in which any packer vested Embry Livestock with the power to act on its own behalf and to bind the packer in buying transactions with third parties. There was no credible nor substantial evidence that any packer had the right to control the conduct of Embry Livestock with respect to buying livestock from third parties at the stockyards. In each instance, the evidence showed that packers bought *from, not through,* Embry Livestock. In each instance, Embry Livestock resold livestock to packers; it did not buy livestock for a packer. Any so-called "commissions," "service charges," and the like, are not true commissions. When the packers called up the corporate Respondent each morning, they did not ask "how are my hogs," rather they inquired as to the general availability of the hogs, the quality thereof, and the prices thereof.

38. The packers treated their transactions with Embry as sale transactions rather than agency transactions.

39. Seven of the eight packers (there were two witnesses who had purchased for Swift and Company) were still doing business with Embry or Midwest Livestock (the company for which Mr. Mohn, Mr. Jenkins and Mr. Koehler now work) at the time of the time of the hearing.

40. Paragraph 3 of the Complaint alleges:

> The corporate respondent***purchased livestock on a commission basis for various packer principals and in accounting to their principals for such purchases of livestock, prepared and submitted invoices showing falsely increased prices as the purchase price of the livestock and collected from the various principals on the basis of such falsely increased prices, in addition to collecting its buying commission.

The record as a whole shows that Embry Livestock Company, Inc., during the period from August 1985 through September 1986, in the transactions set forth in paragraph 3 of the Complaint and at diverse other times, was conducting business as a dealer, and was not purchasing for packers on a commission basis.

Conclusions

Pertinent statutory definitions are contained in the Act. 7 U.S.C. section 201(c)-(d) provides in pertinent part as follows:

* * * * *

(c) the term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) the term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser. * * *

These Respondents did not hold themselves out to be other than dealers. This understanding of a dealer is actually corroborated by the testimony of Mr. Davis wherein Mr. Davis indicated among other things:

A. *** Most people talk about dealers when they are talking about someone who is buying livestock. He has livestock on hand for sale and resells for a speculative profit. An "order buyer" is someone who is talking with someone, making arrangements to buy livestock for them, and then goes out and buys the livestock and charges them a fee for that service. (Tr. 853).

The corporate Respondent took title to the hogs before any sales to other parties were made. For the most part the packer buyers knew the hogs they were buying belonged to Embry Livestock. The purchasers of the hogs got the scale tickets and mostly reweighed the hogs, or they could have. The packer-purchasers paid Embry Livestock directly, as opposed to paying the original sellers directly - and then having an agent's commission paid separately.

The price for the hogs was an agreed upon price after telephone conversations. The packers did not have to buy and take delivery of the hogs from Embry Livestock if they did not want to. The hogs were delivered at a fixed price.

The form of invoice described by the Eighth Circuit in *Western States Cattle, Co. v. U.S. Dep't of Agriculture,* 8th Cir., July 24, 1989, as of "marginal significance," in this case, was copied, at an earlier time than is involved in this proceeding, from the corporate Respondent's predecessor, and, was subsequently revised by the corporate Respondent, but without the benefit of the unpublicized 1949 memorandum.

Embry Livestock, as herein pertinent, was operating as a dealer. As such, it could charge whatever the market would accommodate to.

In order to meet its burden of proof, the government had to prove by a preponderance of the evidence through substantial, convincing evidence at the oral hearing, that Embry Livestock was acting as a market agency purchasing livestock for its packer customers on a commission basis. This the government failed to do.

The term "commission" is not to be employed loosely in applying the definition of a "market agency" in section 201(c) of the Act. Rather, the term

commission refers only to a true commission. *In re Tommy Hines,* 35 A.D. 113, 121-122 (1976). To ascertain what the term "commission" meant to the drafters of the Packers and Stockyards Act, one can refer to various sources, including the definition set forth in dictionaries of the time of the enactment of the Act. According to *Webster's Collegiate Dictionary* (3rd edition 1919), "commission" meant:

> Authority given to act for, or in behalf or in place of another: as, a commission to buy something *** 6. com. (a) A thing to be as agent for another, * * * (b) The percentage or allowance made to -- a factor -- or agent for transacting business; * * *

According to that definition, in order for there to be a "commission" as used in the Packers and Stockyards Act, there must be (a) a fee paid, (b) to an agent (c) for transacting business.

Both the Respondents and the Complainant believe that the Judicial Officer has definitively disposed of the differences which may exist between the buying of livestock on a commission basis, and a dealer situation. In support thereof both parties cite *In re Tommy Hines,* 35 *supra,* (1976) and *In re Sterling Colorado Beef Co.,* 39 A.D. 184 (1980). Among the things which the Judicial Officer did state in those opinions was: "There are many persons registered solely as market agencies to buy livestock on a commission basis who are known throughout the United States as 'order buyers' ***. They do not take title to the livestock they buy for their principal. Their commission is known in advance, and does not depend on the price of any resale to the ultimate purchaser - in fact, there is no resale to the ultimate purchaser." *In re Tommy Hines, supra.* It was also stated in *Sterling Colorado Beef Co., supra,* among other things, that:

> The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents to so act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control.

Also, in *Sterling Colorado Beef,* it was indicated that agency is a legal concept which depends upon the existence of *required factual elements*: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.

It is evident from the aforementioned cases, as well as other applicable law, that whether an agency relationship exists in any given situation is an issue for the trier of fact, to be determined by looking at the understanding of the parties, and the factual circumstances surrounding the transactions in question. Although the way the parties described the relationship is one factor that must be taken into account, it is not the determining factor. The determining factor is how the parties really acted: Did the alleged principal's

actions make it obvious that another was empowered to act for him, did the alleged agent's action show that he consented to so act and do the facts support an understanding between the parties that the alleged principal was in control.

With the respect to the credibility of the Respondents, it is noted that Mr. Reilly, the chief Packers and Stockyards' investigator, testified that he believed the Respondents answered truthfully when they discussed how they were doing business. The uncontroverted evidence shows that Embry Livestock and the individual Respondents believed that Embry Livestock was conducting business as a dealer (Tr. 154, 497, 506, 561, 636, 664, 695). And, it was further indicated that Embry Livestock did not consent to purchasing livestock for its packer customers as a market agency buying on commission. (Tr. 497, 506). There is no evidence that Embry Livestock purported to buy livestock for someone else. A commission is a fee *paid to an agent for transacting business.* A service charge is an amount paid to *someone for providing a service.* In his testimony, Mr. Mohn addressed the distinction between commission and service charges when he testified about Embry Livestock's service charge for lining up trucking and so forth and not for its ability to procure hogs at a good price. (Tr. 466).

According to 7 U.S.C. section 201(c), the term "market agency" means any person engaged in the business of buying or selling livestock in commerce on a commission basis. Before there can be a finding of a true "commission" there must be evidence of a special kind of allowance, that is, there must be evidence of an allowance made to a factor or agent for transacting business for another. *In re Sterling Colorado Beef Co., supra.* The term "commission," properly construed, has an agency component and a component which requires that the charge be "for transacting business for another". That these components should be recognized in construing the term "commission" is bolstered by the context in which the term "commission" is used in the Act. First, the term "commission" is used to define a market "agency". Certainly, the use of "agency" in section 201(c) is consistent with recognizing an agency component in ascertaining the meaning of the term "commission". Second, under the Act's definition of a "market agency", the business of buying livestock, or the business of selling livestock, must be on a commission basis. This linkage between, on the one hand "buying" or "selling" and, on the other hand, the "commission," supports recognition of a component requiring that the so-called "commission" be an allowance for engaging in buying transactions for another or for engaging in selling transactions for another.

In 1949, at a time much closer to passage of the Act than today, the Packers and Stockyards Administration itself recognized a distinction between "commissions" and other types of charges which the Packers and Stockyards believed could be *misinterpreted as commissions.* Specifically, the Packers and Stockyards Administration recognized that a "service charge" or "contract addition" is not the same thing as a "commission".

According to the Restatement of Agency (2nd edition) sections 12-14, the essential characteristics of an agency relationship are (1) the agent's power to alter legal relations between the principal and third persons, (2) the existence of fiduciary duties, and (3) the principal has the right to control the conduct

of the agent with respect to matters entrusted to him. None of these factors was applicable to Embry Livestock.

Briefly stated the evidence shows that the course of business at the Peoria Union Stockyards, consists of activity whereby the farmers, or livestock producers, transport hogs to the Peoria Union Stockyards to be sold there. The market opens at 7:45 in the morning. Some of the hogs arrive the night before. Most of the hogs arrive no later than 7:00 a.m., before the market opens.

At the Peoria Union Stockyards, the farmers and other livestock producers are represented in the sale of their livestock by "livestock commission firms" such as the Dick Herm firm and the Biederbeck Brothers. *These firms act as agents of the livestock producers or shippers.* (Tr. 595, 598-599).

Under the Packers and Stockyards Act of 1921, these commission firms are referred to as "market agencies selling on a commission basis". More specifically, a producer selects his agent among those so-called "commission men". Livestock are then assigned to pens, accordingly, once they arrive at the stockyards. In turn, the commission firms sell the livestock at the stockyards for the highest bid. A commission firm bills the buyer for an amount reflecting the highest bid and sends accounts of the sale to the producer in the form of an accounting plus a check. For performing these selling, agency services for the producer, *the commission firm receives a commission from the* producer.

At the Peoria Stockyards, the commission firms do not take ownership of the livestock. In transactions with Embry Livestock, the farmer always owned the livestock until the point when the livestock went off the scales. At this point, ownership and risk of loss passed to Embry Livestock. (Tr. 596-597, 599). The evidence showed only transactions in which Embry Livestock bought and sold livestock for its own account. Embry Livestock was not buying livestock for someone else. This is consistent with a dealer relationship with respect to packers, since market agencies buying on a commission basis usually purport to purchase livestock for the packer-principal.

Although generally most of the hogs were sold within a very short period of time, and in fact, most were sold to Embry Livestock before 8:30 a.m., with Embry Livestock spending the rest of its day reselling the hogs it had purchased, there were times when it took days for Embry Livestock to resell the hogs Embry Livestock had purchased. (Tr. 301-309, 393-395). During this time Embry Livestock has the risk of loss, not someone else.

Meat packers were customers of Embry Livestock at all relevant times. To them Embry Livestock sold the livestock it had purchased. When one Embry Livestock employee bought hogs from a commission agent, those hogs might be sold by another employee to a packer with whom such other employee dealt.

Although the Judicial Officer has set forth certain principles in the *Tommy Hines and Sterling Colorado* cases *supra,* nevertheless, there is no clear precedent of the Department with respect to the issues and factual situation presented in the subject proceeding. To begin with in this proceeding, it would have been illegal for the corporate Respondent to have operated at the

Peoria Livestock Market as a market agency. It had never registered as such and it had filed no tariff.

In an attempt to set forth distinctions between market agencies and dealers, it is well to review how each of such entities may operate. Under the Packers and Stockyards Act of 1921, in obtaining livestock at stockyards, a packer may place its own salaried employees at the yards to buy livestock at the sales conducted by the commission firms. There is no evidence, and no party contended at the hearing, that Embry Livestock acted in this capacity. In lieu of having its own salaried employees at the stockyards, a packer may buy hogs through agents which, under the Act, are called "market agencies buying on a commission basis". To constitute a market agency, the alleged market agency must "buy on a commission basis". Commissions charged by market agencies are subject to the approval by the Department of Agriculture and must be posted at the stockyards.

A packer might also purchase hogs from "dealers". Dealers, in contrast to market agencies who buy livestock for packers, are not engaged in the business of buying livestock on a commission basis. When a dealer buys livestock, it is bought for his own account, and not on a commission basis. Thus, when a dealer buys livestock from a producer through the producer's commission agent, the dealer does not "buy livestock on a commission basis" within the meaning of the definition of a "market agency" under the Act.

A dealer is typically a speculator or trader. 35 Op. U.S. Att'y Gen. 47, 51 (1926). The Act does not require approval or posting of any of the dealers' rates or charges. A dealer, in selling livestock, is free to charge his customers whatever they agreed to pay. Dealers may incorporate into the sale price a service charge or a contract addition without being transformed into a "market agency". It is even possible that a dealer can charge a "so-called" commission which is not a true commission and still not be regarded as a market agency. *In re Tommy J. Hines, supra.* Indeed, the Judicial Officer has noted that "dealer" status is commonly afforded to those who resell livestock and add on a charge of some kind that is not a true commission. *Id.*, 35 A.D. at 121.

The Packers and Stockyards regulation 201.43(c) is also instructive on the subject of distinguishing between, on the one hand, a market agency buying on a commission basis and, on the other hand, a non-agent dealer. The regulation provides in pertinent part:

> "(c) Purchasers to promptly reimburse agents. Each packer, market agency, or dealer who utilizes or employs an agent to purchase livestock for him, shall, in transactions where such agent uses his own funds to pay for livestock purchased on order, transmit or deliver to such agent the full amount of the purchase price before the close of the next business day following receipt of notification of the payment of such purchase price unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of the principal and in the records of any market agency or dealer acting as such agent."

Under this regulation a packer must pay the full amount of the purchase price before the close of the next business day to an agent who purchases livestock for him. There can be no deductions from the full price or arrangements to reduce the full purchase price. Although the regulation contains the language, "unless expressly agreed ***," this language permits an exception only to the requirement of next day payment, not an exception to the requirement of full payment. *See Fillipo v. S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1009-1020 (E.D. Pa. 1978).

In summary, and in contrast to dealers, market agencies do not take title to the livestock they buy for their principal. They receive a true "commission" which is known in advance and which does not depend on the price of any resale to the ultimate purchaser - in fact, there is no resale to the ultimate purchaser. In contrast, dealers who resell livestock do not charge true commissions inasmuch as they are not involved in agency transactions. This is so even when a dealer has an "order" from the ultimate purchaser of livestock. *In re Tommy J. Hines, supra.* Embry Livestock paid for and took title to the hogs it purchased, and bore the risk of loss on those hogs from the time the hogs came off the stockyard's scales. (Tr. 596-598). Embry Livestock normally did not carry livestock insurance during the week; consequently, Embry "ate" the loss for any hogs that died. (Tr. 705). For any hogs held over a weekend, Embry normally insured against death loss and paid the premium for that insurance. A non-agent dealer has the risk of loss with respect to livestock he owns, while a market agency buying on a commission basis is entitled to full payment of the price it paid to purchase livestock on a packer's behalf. The relevant credible facts in this case do not support the Complainant's proposition that a commission was charged. Accordingly, the Respondents owed no fiduciary duty to their customers to exercise the highest degree of care to protect their interests. There was no duty that was failed.

Reliance upon certain documentation relating to invoices and the door sign, and the interpretation thereof, as well as the alleged understanding of some of the packers is not sufficient to overcome the manner of operations of the corporate Respondent and its employees herein.

The strongest evidence supporting the Complainant's contentions is that of the testimony of some of the packers. However, careful analysis thereof does not disclose that even those packers were deceived. In fact they were not. Their testimony revealed it was based on certain assumptions - and presumptions.

Complainant places considerable reliance on what the packers "believed" and attributes such beliefs to Respondents' practice of invoicing which, as described by Complainant, "* * * clearly led its packers to believe that the price invoiced was the purchase price with the commission or service charge added into the price per hundredweight." The investigating agents, Mr. Grise and Mr. Reilly, did not interview all of the packers who procured livestock from the Respondent corporation, but rather confined their investigation to the six packers where the purchases indicated "the most mark-up." Mr. Harold Davis' testimony likewise reflects that his assessment of the case was premised on what he believed the packers believed when they were

acquiring the livestock. A careful analysis of the packers' testimony dispels this contention.

The testimony of Mr. Homer L. Wilburn, hog buyer for Odom Sausage Company indicated he consulted the daily market prices and then "* * * the guy that I am dealing with, we come to the conclusion, or agreement, what the price should be for that day." (Tr. 30). He was uncertain as to whom he dealt with at Embry Livestock and as to the time periods when he may have purchased hogs from Embry Livestock. He also was uncertain as to the arrangement:

> Q. Do you remember what the agreement was during the time that Mr. Jenkins and Mr. Koehler were basically servicing your account?
>
> * * * * *
>
> A. I sure don't. (Tr. 36).

The government relies on Mr. Wilburn's affidavit of March 6, 1987, rather than his testimony, in an effort to establish the relationship between Odom Sausage Company and Embry Livestock. In this regard, and the circumstances surround his affidavit, Mr. Wilburn testified:

> A. I remember talking to them but I couldn't have told what they want[ed]. (Tr. 37).

Mr. Wilburn stated that he was under the *impression* that Embry Livestock was purchasing for Odom on a commission basis. However, Mr. Wilburn also testified that this impression was based on his dealings with Sitton, Coots and Swords and that he did not personally see any of the invoices after Odom started dealing with Embry. In addition, Mr. Wilburn testified that he believed that all purchases of sows from a terminal stockyard were on a commission basis, but later on he found this to be in error. (Tr. 64-65). In Mr. Wilburn's affidavit (Exhibit 21) Mr. Wilburn stated that sows purchased from dealers who purchased on a dealer basis and sows purchased from stockyards were purchased through order buyers at purchase weight plus commission. In his testimony, Mr. Wilburn stated that he purchased some at the St. Louis Stockyards on a commission and some from a dealer. He subsequently testified that his impression regarding the relationship between Odom and Embry Livestock might have been different if he had had the information about the dealer at St. Louis Stockyards and a copy of Embry's invoice prior to this affidavit. (Tr. 69-87).

Both the testimony and the affidavit of Mr. Wilburn is unreliable, based on (1) his demeanor at the hearing when he discussed the affidavit; 2) Mr. Wilburn's inability to comprehend the written affidavit, as the trier of act observed at the hearing (Tr. p. 53, lines 21-22; pp. 54-55; p. 55, line 20;). 77, lines 11-20; p. 90, lines 18-25; p. 91, lines 1-9); (3) the circumstances under which the affidavit was prepared and signed (Tr. p. 46, lines 10-24; pp. 33-140; pp. 334-36); (4) Mr. Wilburn's demeanor in referring to the

circumstances under which the affidavit was prepared; (5) the fact that before signing the affidavit, Mr. Wilburn was not aware of facts which, had they been known to him, would likely have caused him to reach either no conclusion in his affidavit or even a contrary conclusion in his affidavit regarding the relationship between Embry Livestock and Odom Sausage Company, as demonstrated by Mr. Wilburn's demeanor and testimony at the hearing (Tr. p. 38, lines 16-24; p. 39, lines 1-8; p. 87, lines 20-21); (6) Mr. Wilburn's apparent lack of formal education; (7) his lack of personal knowledge of, and lack of confidence in, the matters asserted without qualification in the affidavit, as demonstrated by his demeanor and testimony at the hearing; (8) the fact that, overall, his demeanor and the substance of his testimony at the hearing demonstrated that he all but recanted the affidavit (Tr. p. 53, lines 8-24; p. 54, lines 2-5; pp. 55-56; p. 76, lines 15-18; and(9) the fact that, overall, Mr. Wilburn's demeanor and testimony at the hearing demonstrated that he believes either that there was a dealer relationship or that he simply has no idea what the relationship was. In short, anyone actually present at the hearing, including the trier of fact, would conclude that Mr. Wilburn's affidavit is unreliable and that his affidavit and his testimony do not constitute substantial evidence of a relationship in which Embry Livestock supposedly entered into buying transactions with third parties and received a true commission for this supposed activity.

The Complainant's contention is that Mr. Garner, head hog buyer for Wilson Foods, believed that Respondent Embry was purchasing livestock for Wilson on a commission or order buying basis. Tr. 442-443. It is alleged by Complainant that Mr. Garner believed that the prices set forth on the scale tickets represented the prices paid by Respondent Embry for the livestock. (Tr. 452).

Back in 1983, when Embry Livestock changed its invoicing procedures and notified its packer-customers that it was acting as a dealer, Wilson Foods was one of Embry Livestock's customers.

Embry Livestock's agreement with Wilson Foods was established with Wilson Foods' Plant in Monmouth, Illinois. In about May 1986, the Monmouth Plant closed. Until this time, Embry Livestock was within the buying territory of Wilson Foods' Monmouth Plant. After the closing of that plant, Wilson Foods' Plant in Logansport, Indiana, bought hogs from Embry Livestock but only for a few months (approximately three months).

Mr. Loren Garner had been the head hog buyer at the Logansport Plant for about 20 years. Mr. Garner testified that he had never known of a written agreement in the livestock business. He further testified that he did not make the original agreement between Wilson Foods and Embry Livestock. Mr. Garner did not know the terms of the agreement between Embry Livestock and Wilson Foods. When he started buying hogs from Embry Livestock in 1986 he never discussed the relationship between Embry Livestock and Wilson with the previous hog buyer for Wilson. The only testimony regarding Embry Livestock's prior relationship with Wilson was that Embry Livestock sold to Wilson on a dealer basis. (Tr. 663-664). He assumed (he guessed) that once the Monmouth Plant closed and the Logansport Plant started buying hogs from Embry Livestock, the relationship continued on the same basis as before.

He simply assumed that Embry Livestock previously was acting as an order buyer. Mr. Garner's understanding of an order buyer is somebody who buys on a packer's order from a commission firm and charges a packer a commission. Whatever Mr. Garner's assumptions, they were not based on anything concrete and no inquiry was made by him as to the purchasing arrangements. Such assumptions should not be binding on the Respondents.

Consistent with Mr. Garner's assumption was that there was a market agency relationship between Embry Livestock and Wilson Foods, Mr. Garner testified that if hogs died at the stockyards, the risk of loss would be on Wilson Foods, not Embry Livestock, because at that point, "They were [Wilson] hogs." He also testified that in- transit, shrink would be at Wilson Foods' risk.

The government did not present any evidence concerning the nature of any agreement Wilson Foods had with Embry Livestock. It only presented Mr. Garner's testimony, concerning what Mr. Garner assumed the relationship was after he inherited it. Any contention that Embry Livestock's practices misled Mr. Garner into his assumption is belied by the fact that Mr. Garner did not see Embry Livestock's invoices. In any event, even if he had seen the invoices, they were not misleading because, at the time Mr. Garner got involved, the invoices complied with the Packers and Stockyard Chief's 1949 memorandum and clearly indicated "Livestock Dealers."

The evidence, moreover, showed that the relationship between Wilson Foods and Embry Livestock was not the order buying relationship described by Mr. Garner in his testimony. The evidence reflected that there was risk to Embry Livestock which, as Mr. Garner testified, would not reflect an "order buyer" relationship according to his understanding of the term.

In addition, there was testimony that (before the closing of the Monmouth Plant) the agreement was that Embry Livestock was operating as a dealer. Embry Livestock's employees testified that this agreement was reached with Embry Livestock's customers shortly after the Consent Decree. At this point, Wilson was a customer. This testimony was not contradicted by anyone. It is the only testimony in the record on this point except for Mr. Garner's assumption, which is not sufficiently relevant with respect to the actual relationship which existed between Wilson Foods and Embry Livestock. In addition, Mr. Garner's assumptions are insufficient to establish any agency relationship or a true commission. Assumptions are not evidence that Wilson agreed to vest Embry Livestock with the power to act on Wilson's behalf and to bind Wilson to contracts with third parties in which Wilson purchased hogs from such third parties. There was no evidence that Embry Livestock believed it had this power or that it consented to assuming this sort of power. There was no evidence that Wilson exercised control over Embry Livestock's purchases of livestock in the early hours of buying activity at the Peoria Union Stockyards, nor was there any evidence that Embry Livestock consented to such control over its buying activities. Certainly, Wilson made known to Embry Livestock the type of hogs it wished to purchase - particularly the weight thereof since they did not want to kill and dress lean hogs. It is true, however, that Embry Livestock included a service charge in the sales price to Wilson, but this was entirely consistent with being a livestock dealer, as

demonstrated by the Chief's 1949 memorandum, and is consistent with the applicable provisions of the Act and the Packers and Stockyards regulations. There was no evidence of a true commission, received by Embry Livestock, for making buying contracts for Wilson, with third parties, in which Wilson, through Embry Livestock, agreed to purchase hogs from third parties.

There was no evidence of a fiduciary relationship. Indeed, the recognition of a fiduciary relationship to Wilson and to the other packers would not even be practical. This is so because the supply of hogs is acquired in a flurry of buying activity at the opening of the market at the Peoria Union Stockyards. Once Embry Livestock purchases hogs during this flurry it spends the rest of the day selling the hogs. It is not practical, or credible, to think that Embry Livestock buys livestock for any packer in particular during this buying frenzy. Moreover, assuming that Embry Livestock, during the early morning buying session, is able to purchase some hogs at a favorable, below market price, and others at a higher, market price, how would it be possible to resolve the fiduciary duties to its many packer customers by determining which packer would be sold the favorably priced hogs (at cost plus commission) and which packers would be sold the average priced hogs (at cost plus commission)?

In summary, there is not substantial evidence in the record to support the proposition that Embry Livestock acted as a market agency in its relationship with Wilson Foods.

The packer Swift was one of the packers contacted in 1983, when Embry Livestock represented to the packers it would operate on a dealer basis. The testimony of Joe Fictor and Kenneth Losey, was received in evidence at the hearing. Their testimony showed that Embry Livestock was regarded by Swift (through Mr. Fictor), as a livestock dealer until Swift's plant at the National Stock Yards closed in March, 1986. The testimony further showed, at that point, that Swift's Marshall Town Plant (through Mr. Losey) started doing business regularly with Embry Livestock. Mr. Fictor and Mr. Losey did not discuss with each other the basis on which Swift was doing business with Embry Livestock. Mr. Losey testified that in August, 1986, his understanding was that the relationship was on an order buyer basis, but he also testified that his understanding was based on his assumption, and not on the basis of any agreement with Embry Livestock. His assumption was based on his belief that he had always dealt with order buyers at terminal markets. Notwithstanding his apparent assumption that Embry Livestock was acting as an order buyer for Swift, Mr. Losey testified that he understood that Embry Livestock was buying hogs for its own account and then selling them to Swift:

> Q. When you were dealing with Embry back in 1986, did Embry own the hogs until the point that they got on the truck, and at that point, they became your hogs?
>
> A. That's right. (Tr. 398, see also Tr. 381, lines 20-21).

Swift treated the risk of loss as being on Embry Livestock. Mr. Losey testified that Swift reweighed the hogs it bought from Embry Livestock and billed them back if the weights were not right. The hogs were regarded as

Embry Livestock's responsibility and Embry Livestock bore the risk of loss prior to the hogs being loaded unto the truck for transport to Swift. Despite the fact that Swift was responsible for the trucking, Swift deducted for in-transit shrink that it thought was too high. Mr. Fictor testified that Swift deducted for hogs that died or that were badly crippled on the truck. The risk of loss for hogs did not pass from Embry Livestock to Swift until the hogs crossed the scales at Swift's plant. Further testimony of Mr. Losey indicated that his understanding was not based on anything said or written:

Q. I believe you said that Swift closed its plant in East St. Louis in March of 1988?

A. Yes. I did.

Q. I believe your testimony was that you were aware that Swift at East St. Louis was purchasing from Embry prior to that time?

A. Yes.

Q. Did you have conversations with the person who was doing the purchasing for Swift out of the East St. Louis plant?

A. Joe Victor, yes.

Q. Did you talk about the relationship between Embry Livestock, and Swift?

A. No.

Q. You never talked about it at any time?

A. No, we didn't.

Q. Is there any particular reason why you did not?

A. Not necessarily. It just never came up.

Q. You were working for the same company?

A. Yes.

Q. When they stopped buying in East St. Louis, and started buying in Marshall Town, Iowa, you did not discuss your relationship with the people that you were purchasing hogs from at all?

A. No. I'll tell you why. Every plant operates individually. We concentrate mostly in Iowa, and they were in Illinois. I have very little with Mr. Victor's business in St. Louis, and what we thought we

could buy in Peoria would be, at that time, lighter weight hogs, and some top hogs that would work for us at the time.

As far as Joe and I talking things over about arrangements, we didn't. I was just not brought up.

Q. I believe you testified earlier that either it was your belief, or that you assumed that any hogs purchased at a terminal stock yard, were necessarily purchased on a commission basis?

A That was my understanding. I mean this has my understanding. (Tr. 395-397).

Mr. Fictor understood that while he was purchasing for Swift, he believed Embry Livestock was operating as a dealer. (Tr. 550).

Another packer testifying on behalf of the government was Mr. Jess W. Beasley, an employee of Rudy Farms Company. Rudy Farms was one of the packers which was contacted in 1983 concerning Embry Livestock's status as a livestock dealer. In his testimony, Mr. Beasley, clearly indicated that he was purchasing hogs on a dealer basis. Among other things he testified:

Q. Now, this shows that seventy-eight head of livestock, sows, was purchased by Rudy Sausage Company of Nashville, Tennessee on August 12, 1986. Did you contact Embry? [Objection]

A. It would be me, or Bill McNeil, my assistant ***

Q. What was the manner in which Embry procured hogs for you?

A. Well, basically it was on a dealer basis, I can cut out what hogs I don't like. On a commission basis, when the buyer puts them in the pen, they're our meat. If they die, we don't like that. (Tr. 406-407).

When Mr. Beasley purchased hogs on a dealer basis, he limited in-transit shrink to three percent. Consistent with Mr. Beasley's testimony that Embry Livestock was operating on a dealer basis, the evidence showed that at relevant times, Rudy Farms charged back the dealer, Embry Livestock, for allegedly deficient livestock.

Mr. Bill Nethery, an employee of F.B. Purnell Sausage Co. testified for the government. Mr. Nethery for six years was a plant superintendent for Purnell in Simpsonville, Kentucky. During this time, he was the "back up" for purchasing hogs for Purnell. About three years before the hearing, in about March, 1985, he was promoted to the position of plant manager, with responsibilities for personnel, hog buying and managing the plant. Mr. Nethery was new to hog procurement - and was not too familiar therewith.

During the oral hearing Mr. Nethery testified that the term "Livestock Dealer" or "dealer" had no specific meaning to him "until the last day". Mr.

Nethery believed first, that animals that are purchased at a stockyard are purchased on a commission basis and, second, that all the animals that are purchased at buying stations in the country are purchased on a dealer basis. In the final analysis Mr. Nethery didn't care whether an amount of money reflected a commission or a service charge, or whether he is dealing with a "dealer" or an "order buyer." Mr. Nethery is interested in the bottom line on an invoice. His testimony demonstrated that he did not know the arrangements by which Purnell procured hogs - he "just kind of inherited it" when he became plant manager. He testified, "I really don't know." (Tr. 349).

The evidence shows that the beliefs or understandings of Mr. Nethery as to the relationship with Embry Livestock were consistent with, and apparently caused by, the general beliefs that Mr. Nethery held about relationships in general; again, Mr. Nethery believed that hogs bought at stockyards are on a commission basis, while hogs bought at buying stations are on a dealer basis. (Tr. 371). Mr. Nethery's understanding of the relationship that he inherited for purchasing livestock at the Peoria Union Stockyards was that Embry Livestock procured livestock on a commission basis. However, he believed that there was no difference between a service charge and a commission. He believed that Embry's "service charge" of $.35 per hundredweight could be called a "commission". (Tr. 363).

In addition, Mr. Nethery stated that he dealt with Russ Mohn, one of the Respondents in this case, and an employee of the corporate Respondent. Russ Mohn came to work at Embry Livestock on the first working day of August 1985. (Tr. 619). The invoice from Embry Livestock to Purnell, introduced as Complainant's Exhibit 22 (although headed "Livestock Dealer" and otherwise proper under the parameters of the Chief's 1949 memo *supra*) does set forth the "service charge" separately rather than incorporating it into the sales price. This can only be attributed to the fact that Mr. Mohn had just started to work for Embry Livestock and was not aware of the history Embry Livestock had had with separate designation of service charges on its dealer invoices. The problem was corrected, as reflected by Mr. Nethery's testimony, on the occasion when Mr. Mohn told Mr. Nethery about how the "service charge" would be handled in the future. (Tr. 360, 361). Thereafter, Embry Livestock's invoices to Purnell complied with the Chief's 1949 memorandum.

Mr. Nethery's testimony indicated, among other things, that he inherited his position from a prior purchaser and although he would call early in the morning with respect to the prices of the hogs, he could not remember any particular transaction. Although Mr. Mohn was his contact person at the corporate Respondent, nevertheless, he never had met Mr. Mohn prior to the oral hearing. Mr. Nethery used scale tickets to confirm the invoice tickets - this would have meant that he was in position to determine any undue price mark-up because the corporate Respondent's scale tickets, which are in evidence, reflect not only the weight of the animal but also the price (written in pencil). Mr. Nethery indicated that his understanding of the transactions was based on a course of conduct. His testimony further indicated that he was not entirely clear as to the differentiation between dealers and commission merchants.

Another packer who testified on behalf of the government was Mr. Richard Nejmanowski. The Complainant points out that he testified that the relationship between his company and Respondent Embry Livestock was on a commission basis. (Tr. 421).

Diamond Packing Company was one of the packers which was notified in 1983, after the Consent Decree, that Embry Livestock was operating as a dealer. At this point, in 1983, Embry Livestock changed its method of invoicing. (Tr. 209-293). This testimony was uncontradicted (except with respect to the special case of invoices to Purnell in August of 1985, shortly after Russ Mohn started working at Embry Livestock). In fact, the invoices to Diamond Packing admitted into evidence, *all reflect no separate service charge.* In fact, the government's investigator, Mr. Reilly, found that the Respondents statements on these points were credible. (Tr. 275-277).

Mr. Ron Jenkins did not start working for Embry Livestock until November 27 or 28, 1984. (Tr. 601) Mr. Jenkins did not even start to talk to packers until after August, 1985, after Earl Mohn passed away. (Tr. 607-608). Mr. Nejmanowski testified on direct examination that he had a telephone conversation with Mr. Ron Jenkins, during which Mr. Jenkins discussed a change in invoicing procedure being implemented by Embry Livestock. Mr. Nejmanowski during his direct testimony identified the time of the change in invoicing procedure as being between August, 1985, and August, 1986. (Tr. 422-429). Mr. Nejmanowski testified that, during his alleged conversation with Mr. Ron Jenkins, Mr. Jenkins allegedly referred to a "commission" and allegedly stated that henceforth the commission would be billed in each entry rather than separately. (Tr. 422-430).

Back in March, 1987, Mr. Nejmanowski signed an affidavit stating that his alleged conversation with Mr. Jenkins occurred "approximately four years ago". An evaluation of the credible evidence seems to indicate that such alleged conversation with Mr. Jenkins referred to in Mr. Nejmanowski's direct examination did not occur. Nor did the alleged conversation referred to in Mr. Nejmanowski's affidavit occur, at least with the person and during the time when it was indicated. At the time Mr. Jenkins started talking to packers in August, 1985, Embry Livestock invoices to Diamond reflected the new invoicing procedures. (Tr. 430). When Mr. Nejmanowski was confronted with this fact, he responded that he "wasn't sure" when the change in invoicing occurred. When asked for his best recollection regarding when the change in invoicing occurred, Mr. Nejmanowski responded:

> A. Several years ago. I'm not sure, several years ago. I'm not the one on trial. I don't need to be lying here. (Tr. 431).

Thereafter, Mr. Nejmanowski was agreeable to saying that the alleged conversation occurred approximately four years before he signed his affidavit in March, 1987. However, when confronted with the time when Mr. Jenkins was at Embry Livestock talking with packers, Mr. Nejmanowski again was uncertain and defensive. (Tr. 432-433).

The weight of the credible evidence indicates that Mr. Nejmanowski's testimony was that his alleged conversation occurred with Mr. Ron Jenkins

when Embry Livestock changed the way it invoiced. (Tr. 434). There is no question that this was not during the period of August, 1985, to August, 1986, when Mr. Ron Jenkins started dealing with packers. The change occurred in 1983, close to the time of the Consent Decree. Mr. Ron Jenkins was not at Embry Livestock at that point. It should be noted that Mr. Ron Jenkins' testimony was that such conversation did not occur. (Tr. 606).

Although a conversation took place, it was in 1983 because, Diamond was contacted by Embry Livestock, relative to the service charge, not being a commission, and Embry Livestock's role as a livestock dealer.

Mr. Nejmanowski's alleged perception of Embry Livestock's status as a market agency was purportedly based on the alleged conversation with Mr. Ron Jenkins, and such alleged conversation does not seem probable, nor credible, at least with Mr. Jenkins. Additionally, other statements and testimony of Mr. Nejmanowski are much more consistent with Embry Livestock acting as a dealer rather than a market agency buying on a commission basis. Indeed, he told Agent Reilly about shipments of extra hogs to him when he felt that prior shipments were "over priced." (Tr. 285, 436, 437). Moreover, Mr. Nejmanowski's impression of purchases from terminal markets as "Pretty much, commission." (Tr. 420); "You buy in terminals on commission." (Tr. 438).

A witness testifying on behalf of the Respondents was Mr. Gary Mahon of IBP where he was employed as a head hog buyer for the IBP hog slaughter plants, in Storm Lake, Iowa, Madison, Nebraska, Council Bluffs, Iowa and Columbus Junction, Iowa. Mr. Mahon testified, among other things, that:

Q. "On what basis do you purchase livestock from Embry Livestock?"

A. "On a dealer basis." (Tr. 454).

Also, Mr. Mahon explained that IBP pays service charges to dealers and he indicated the way the cost of the hogs to the purchaser packer was arrived at:

Q. What is your definition of price? My price, his price?

A. I quote to Clarence [Swalve] prices that I am willing to pay. He may come back to me and say, "Here's what it will cost," and then, I'll say, 'Yes' or "No". (Tr. 462).

It is evident from Mr. Mahon's testimony that the price he paid for the hogs was a negotiated one on a straight dealer relationship.

Another packer purchaser from Embry Livestock, and who testified, was Mr. Gary Leips, the manager of all livestock procured at Emge Packing Company in Anderson, Indiana, where Mr. Leips had been employed for 27 years. His testimony likewise indicated that he understood Embry Livestock was acting on a dealer basis. It is very evident from his testimony that he too, in frequent telephone conversations with Embry Livestock, would ascertain the amount and quality of available hogs for a particular time and the price

thereof. Mr. Leips would tell Embry Livestock (Mr. Swalve) the price he would pay for the available hogs and quality. Thereafter, it was a matter of whether or not Embry Livestock would sell the hogs for the price that Mr. Leips indicated he would pay. It should be noted that if Embry Livestock had been purchasing for Mr. Leips, he would not have been in a position to refuse to take delivery of the hogs.

In summary, it is clear from testimony of those packers who indicated that they believed Embry Livestock was purchasing for them on an agency basis that their beliefs were based primarily on factors outside of the actual relationship with their respective companies and Embry Livestock; they believed Embry Livestock was a market agency buying on commission because Embry Livestock was located at a terminal stockyard; or they simply assumed Embry was a market agency buying on commission without communicating with the person who had previously purchased hogs for that same packer and with whom the dealer relationship was established. Also, some of them had not seen the scale tickets nor the invoices. There is no believable evidence that any of the packer purchasers was deceived or that they were charged anything other than what they agreed to pay in their telephone conversations.

In 1983, after it entered into a Consent Decision in P. & S. Docket No. 6100, the credible evidence is that - Embry Livestock notified all of its packer customers (which included among them Odom, Swift, Wilson and Diamond) that it was conducting business on a dealer basis and would be changing its billing procedures accordingly. (Tr. 561, 854). The fact that the memory of some of the packer buyers was hazy is understandable because, whether through affidavit or testimony, they were being asked to recall a conversation of four or five years in the past.

The Complainant herein emphasizes its assertions that the changes accomplished by Embry Livestock as the result of the 1983 Consent Decision were not satisfactory to the Agency with respect to the invoicing and the sign on its office door. In this regard, and as previously noted herein, care must be taken with respect to any reliance on Complainant's attached copy of Exhibit 22 to its brief inasmuch as such invoice is dated January 3, 1983, a date before the Consent Decree in P&S Docket 6100, and before Embry Livestock revised its procedures.

In 1983, at the same time that Embry Livestock notified all of its packer customers that it was conducting business on a dealer basis, it also changed its invoice forms and sign on its office door. Embry changed its invoice forms by replacing the words "Order Buying Service" beneath the firm's name with the words "Livestock Dealers." (Exhibits 3-20). In addition, on the line for the customer's name, it replaced the word "name" with "sold to". Additionally, it discontinued identifying the commission firm from whom Embry Livestock had purchased the hogs. Embry Livestock also changed the sign on its door by replacing "Order Buyers" with "Buying Service". Although the Complainant, on brief, argues strenuously that "Buying Service" is synonymous with the term "Order Buyer" and, *ipso facto,* proves that Embry Livestock was acting as a market agency buying on commission, that is not the case. The term "Buying Service" does not appear anywhere in the Act nor the regulations nor in any agricultural decision to which reference has been made.

There was no evidence whatsoever that any packer had ever seen Embry Livestock's door, either before or after 1985. In fact, the only evidence on this point was that the packers always did business with Embry Livestock by telephone, not in person. Embry Livestock's employees, who go in and out the door daily, could not remember exactly what was written on the door. Even the Packers and Stockyards' investigator had to make a special trip to Embry Livestock's office during the hearing to determine exactly what was written on the door. In summary, there is no evidence that any packer was misled, deceived, or confused by the folderol over Embry Livestock's door.

The Complainant's discussion on brief with respect to the invoicing practices of Embry Livestock is not sufficiently relevant and material to the extent that it is premised upon the January, 1983, invoice form. However, an examination of the evidence indicates that normally, when a livestock business is buying livestock "on order" for a packer, the "sold to" blocks on the stockyard's scale ticket will carry a number which identifies the packer for whom the livestock was purchased. (Tr. 804-805). The "sold to" blocks on the scale tickets in this case carried no such packer identification; they carried simply an "ELS" (Embry) number that designated the type of hog Embry had purchased. (Exhibit 3-20, Tr. 565-566, 640). When a livestock business is buying livestock "on order" for another person, the original invoice and/or the scale ticket issued by a stockyard will show the buyer's name "for the name of the other person" e.g., "Smith for Jones". Neither the invoice nor the scale ticket in this case carried such an entry. The invoices and scale tickets provided to Embry by the commission firms from whom Embry bought hogs showed that the hogs were sold to Embry; they did not show sold to Embry for someone else. (Tr. 597). The following acknowledgment, on brief, by the Complainant is most noteworthy:

> *Complainant acknowledges that with respect to most of the transactions and the documentation prepared by respondents and provided to the principals, no commission is separately set out.* This fact does not change the nature of the relationship between the parties from being a market agency one to a dealer relationship. *The packers were obviously concerned with the "bottom line" of what the livestock was going to cost them.*

Another point emphasized by the Agency was the argument that having price breaks of $.35 cents or $.85 cents, having multiple line entries on the invoices and sending scale tickets along with the invoices made the transactions in this case agency transactions. This they did not do. It will be noted that the chief Packers and Stockyards' investigator in this case told Foster Embry and the employees of Embry Livestock that he had found nothing wrong with the way Embry Livestock was invoicing its packer customers. (Tr. 608, 633, 735). The Complainant's position with respect to the invoicing practices of Embry Livestock is more fully set forth in its brief wherein it sets forth among other things:

* * * In addition, close examination of the completed invoices reveals the most damaging fact. All the invoices have a place, at the bottom, for the entry of a "service charge." When we examine those invoices in which the service charge is separately set out [CX 1 pp. 5, 10, 14 and 17; CX 3], the price at which the livestock was billed would always be in either even dollar or half dollar price breaks. [Footnote omitted].

In those invoices in which the service charge was not separately set out, the price at which the livestock was billed would almost always be either $.35 or $.85 price breaks, clearly an indication that a $.35 per hundredweight "service charge" or commission was being added onto the price* * *. Thus, respondents practice of invoicing the livestock to the packers clearly led the packers to believe that the price invoiced was the purchase price with the commission or service charge added onto the price per hundredweight.

As an example, the Complainant directs attention to an examination of the line item entries on the invoices which relate to F. B. Purnell, in which the commission or "service charge" was separately set out, and which shows, of the seventy-three entries, thirty-nine of the prices (53.4%) were at the even dollar amount; thirty-two of the prices (43.8%) were at the half dollar amount and two of the prices (2.7%) were at the quarter dollar amount. Thus, Complainant urges that 97.3% of the prices at which the livestock were billed out, when the "service charge" or commission was separately set out, were at the even dollar or half dollar amounts.

This does not, *ipso facto,* indicate agency transactions. These practices do not stand alone. Embry Livestock took title to the hogs it bought. Embry Livestock paid for the hogs it bought. Both Embry Livestock and the packers treated the transactions as sales transactions under Article 2 of the Uniform Commercial Code. On numerous occasions, Embry sold hogs to packers for less than it had paid for those hogs. Embry Livestock's invoice, which went with every group of hogs, carried the legend "Livestock Dealers". One of the Complainant's own witnesses testified that dealer invoices show all different kinds of price breaks. (Tr. 413).

Although multiple line entries may be seen more frequently on the invoices of agents than on the invoices of dealers, multiple line entries do not, *ipso facto,* indicate an agency transaction. Mr. Swalve testified that he felt multiple line entries were a service to the packers, because it helped them check for errors. Mr. Gary Leips of Emge testified that having separate entries on a page didn't indicate anything about the relationship between Embry Livestock and Emge; the separate entries helped him locate any problems with respect to weight, quality, miscount and other matters. Mr. Mahon stated that dealer invoices may or may not contain multiple line entries. Mr. Fitcher of Swift stated that multiple listings on invoices didn't indicate anything about the relationship between the parties to the transactions. (Tr. 563, 527, 528, 458, 468). With respect to Embry Livestock sending scale tickets along with its invoices, Mr. Swalve testified that giving packers scale tickets is a service because they can use them with a multiple line entry invoice to check for

errors. Mr. Leips testified that he checks his scale tickets against the multiple entry invoices he receives from Embry Livestock to see that they agree, he checks the numbers, counts and matters of that nature -- receiving the scale tickets protects against transposition errors. Mr. Nethery of Purnell testified that having scale tickets makes it easier to confirm invoice figures -- it makes it easier to confirm invoice figures if he has an invoice with a limited number of head with a scale ticket that matches. (Tr. 367, 563, 564).

The evidence does not support an additional argument of the Complainant to the effect that the Respondents' method, of dealing with and accounting for the livestock, was meant to and did deceive the packers and customers and caused them measurable financial harm. It is the Complainant's position that the customers of Respondents were deceived in believing that the transactions were commission transactions. Accordingly, it is said that such belief resulted in deception, as well as financial harm to the customers and that the Respondents use of false accounting perpetuated this harm and deception. As an example, the Complainant indicates when the amount of the mark-up above the "commission" is computed for the transactions set forth in Complainant's Exhibit 1 and 2, the injury to the various packers measured $19,986.89. It is further alleged that such false accounting constitutes a violation of section 401 of the Act (7 U.S.C. § 221). *In re: Spencer Livestock Commission Co., et al., supra.* Additionally, such assertions by the Complainant are directed to section 312(a) of the Act which makes it "unlawful for any stockyard owner, market agency, or dealer to engage in or use any . . . deceptive practice or device" in connection with certain listed actions. However, the referenced elements for deception and deceit do not exist in this case.

Although the Judicial Officer may not attribute much relevance thereto, it is significant that all of the packers, except Wilson (when Wilson's Monmouth plant closed, Wilson's Logansport plant purchased hogs from Embry for a few months) are still doing business with Embry Livestock or Midwest Livestock (where Respondents Jenkins, Mohn and Koehler now work). If the packers believed they had been deceived, they surely would have discontinued during business with the Respondents. They did not because they were not deceived. As several of the packer buyers testified, they did not care whether Embry was an order buyer or a dealer, nor did they care what figures went to make up the total price; they were only interested in the bottom line, that is the price they had to pay for the hogs which they desired to purchase from Embry Livestock. Finally, it should be noted that the packer buyers in this case purchased literally hundreds and thousands of hogs each week, from many different sources. It stretches ones imagination to the breaking point to believe that men of such a degree of sophistication and expertise in purchasing hogs were deceived.

In addition to the corporate Respondent, the Complainant seeks sanctions against the individual Respondents who were employees of Embry Livestock. Complainant maintains that such employees had day to day management, direction and control of the corporate Respondent. The evidence does not support this contention.

The corporate Respondent had the discretion to manage its profit-making operation in any fashion it deemed appropriate. The fact that it accomplished this purpose through its employees does not bestow upon them the "management" therefor.

The individual Respondents did not manage, control and direct or take charge of the affairs of Embry Livestock. They exercised no skill nor judgment with respect to its management. The individual Respondents were not officers of Embry Livestock (Tr. 495); they were not directors of Embry Livestock (Tr. 495); and they were not in charge of Embry Livestock's office. The individual Respondents could not write checks on Embry Livestock (Tr. 495, 496); they did not have the authority to determine with whom Embry Livestock did business (Tr. 500) (except for very small accounts); they did not determine where Embry Livestock had its bank accounts (Tr. 495); they did not make decisions about financing for Embry Livestock (Tr. 494); they did not make decisions about whom Embry Livestock would use as its accountant (Tr. 497); they did not determine what form of invoice was to be used; nor did they make the decision regarding where Embry Livestock offices were to be located (Tr. 504). The individual Respondents were employees of Embry Livestock who purchased and sold hogs for Embry Livestock.

On brief, the Complainant argues that Harry Embry, the President of Embry Livestock, could not manage Embry Livestock because he lived three hundred and twenty miles from the Peoria facility. This relatively short distance, however, did not preclude Mr. Embry from managing, directing and controlling Embry Livestock Company, Inc. Not only did he make the trip to Peoria once every six weeks or so, he talked to the Peoria office on a daily basis, he determined who could write checks on Embry Livestock, he determined with whom Embry would do business, he had control over its bank accounts, he made the decisions regarding the financing of Embry Livestock, and he also made the decision about whom it would use as its accountant and the location of its offices. (Tr. 482-495). Mr. Embry and his sister were the ones who met with the Packers and Stockyards representatives in Springfield, Illinois, and declined to file a tariff for the Peoria Union Stockyards because it was their purpose to operate as a dealer. He or his sister would have instructed Embry employees to notify all packer customers that Embry Livestock was conducting business on a dealer basis. (Tr. 484, 485, 505). According to the Complainant, one of the more telling facts which showed that Harry Embry's "management" was not necessary, was that Respondent Embry used Mr. Foster Embry to introduce its "Annual Report" at the hearing. This is not viewed as of material importance. First, it was Complainant, rather than Respondent, who called Harry Embry as a witness at the hearing. Secondly, Mr. Harry Embry left before the hearing was over because his wife was seriously ill. Thirdly, since Embry Livestock's Annual Report had been filed with the Packers and Stockyards Administration (and, in fact, the copies that were introduced came from the Agency's files), those Annual Reports could have been introduced through the Packers and Stockyards Administration's own employees in the Indianapolis office. Fourthly, Embry Livestock's Annual Reports were introduced for two purposes: To show that Embry Livestock had consistently filed as a dealer

and to lead into testimony regarding what impact a suspension of Embry Livestock would have on the Peoria Union Stockyards. There is no significance to be attributed to the fact that the Annual Reports came in through Mr. Foster Embry, a Vice-President of Embry Livestock and Chairman of the Board of the Peoria Union Stockyards. Also, Mr. Foster Embry did not testify about the financial condition of Embry Livestock (that had already been stipulated to (Tr. 8)) and Mr. Embry's testimony about the volume of business done by Embry Livestock came from the records of the Peoria Union Stockyards, not from Embry's Annual Reports.

Considerable attention had been devoted to a "profit sharing-arrangement" which Embry Livestock allegedly had with some of its employees. However, such was not a true profit-sharing arrangement; it was the manner in which four of the individual Respondents were paid. Rather than have the four individual Respondents on a fixed salary, with a bonus based on the company's profitability (such as was the case with Mr. Pille, the bookkeeper (Tr. 695), the four individual Respondents drew against the available money and settled up on a periodic basis. (Tr. 501). With respect to Respondent Ron Jenkins, his paycheck was on a fixed salary basis, not on the basis of a salary determined by a formula.

It is not necessary to reach, for determination, other issues raised in this proceeding, and only a brief summarization will be made.

There is a question as to whether or not the corporate Respondent had notice of the practices which constituted alleged violations of the Act as a result of the previous order against it.

In February 1983, the Secretary and the corporate Respondent entered into a Consent Decision, which, among other things, required the corporate Respondent, its officers, directors, agents and employees, to cease and desist from certain practices, which practices have some similarity to those at issue in this proceeding. Although the corporate Respondent made a good faith effort to comply therewith, apparently the changes which it did inaugurate subsequent to that 1983 decree, did not satisfy the Packers and Stockyards Administration. As noted above, the Agency was not pleased with the way the door sign read (although there is no evidence that any of these buyers ever saw the door sign or if they did, they were deceived); and with the way the invoices were changed. Also, the Complainant questioned the effectiveness of the notification which the corporate Respondent gave to its packer buyers, with respect to the fact that it was operating on a dealer basis. There is no question but that the corporate Respondent did have notice that the practices which it engaged in prior to February 1983 were considered by the Packers and Stockyards Administration to be questionable. Subsequently thereto, the corporate Respondent, as the result of its visits to various Packers and Stockyards offices took affirmative steps which it believed brought it within compliance with that decree, although the Agency maintains that it did not sufficiently comply with the February 1983 Consent Order. Neither the corporate Respondent nor any of the individual Respondents received written or oral notice that the matters complained of in the present Complaint were

not in accordance with the Agency's interpretation of the Act - and thus were not accorded the opportunity to achieve full compliance.

Section 403 of the Packers and Stockyards Act (7 U.S.C. § 223) provides in pertinent part:

> When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer or any live poultry dealer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer or any live poultry dealer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

Under the provisions of section 403, the Complainant maintain that the acts of the individual Respondents can be deemed to be not only their own, but the acts of the corporate Respondent.

The Complainant maintains that there is a distinction to be made with respect to Respondents Mohn and Jenkins, because their employment with Respondent Embry Livestock began after the original 1983 cease and desist order was entered. However, the Complainant indicates that they are equally culpable with the Respondents Swalve, Koehler and Carlson, the latter three of whom were employed by Respondent Embry Livestock from the time of Embry's beginning. (Tr. 554, 633 and 660).

Notwithstanding this position, the Complainant argues that the question is not whether the individual Respondents had "notice" under the provisions of the Administrative Procedure Act, but whether the Respondents' practices could be determined to be "willful" under the Administrative Procedure Act as that term is defined within the Department, citing *In re: J. A. Speight,* 33 Agric. Dec. 280 (1974), wherein there is a definition by the Judicial Officer with respect to the meaning of the term "willful" as set forth in the Administrative Procedure Act (5 U.S.C. § 558(c)):

> A violation is willful, within the meaning of the term in a regulatory statute, if the violator "(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of the statutory requirements. (*Goodman v. Benson,* 286 F.2d 896, 900 (7th Cir. 1961); Other numerous cites omitted).

Furthermore, the Complainant maintains that even if the practices complained of were not intentional, they showed a "careless disregard of statutory requirements". As example thereof, the Complainant notes that the sign over the corporate Respondent's door did not conform to the Packers and Stockyards' requirements. There is no evidence herein that the individual Respondents were responsible for the sign over the corporate Respondent's door. It indeed would have been most unusual for an employee to take down a sign of the corporate Respondent and substitute one of his own.

The record as a whole fails to show that there was any written notice as required by the Administrative Procedure Act 5 U.S.C. section 558(c), and there has been no persuasive showing that any of the Respondents intentionally did a prohibited act or acted in careless disregard of the statutory requirements. The U.S. Department of Agriculture's Judicial Officer stated in *In re: American Fruit Purveyors, Inc.*, 30 A.D. 1542 (1971):

> . . . In most circumstances, it would be a sufficient warning under Section 9(b) of the Administrative Procedure Act to advise a firm that complaints have been received from shippers alleging that it is failing to pay promptly and advising that failure to pay promptly is a violation of the Act. However, where, as here, . . . there is a reasonable basis for a difference of opinion . . . and the firm sent numerous letters and wires to the Complainant which should have put the Complainant on notice of the fact that the firm was misconstruing the Act and the regulations (in the complainant's opinion), the Complainant has not given the notice required by section 9(b) of the Administrative Procedure Act unless it clarifies the misunderstanding. Such clarification is necessary to give the firm a "second chance". A firm does not have a true second chance to correct its conduct if it notifies the Complainant of its construction of the Act and the regulations and tells the Complainant that it plans to proceed in that manner, and the Complainant never corrects the misunderstanding. (30 A.D. 1578-1587). [Footnote omitted].

The uncontroverted evidence in the case at bar is that the Packers and Stockyards Administration never sent any written "warning" to Embry Livestock indicating that it believed that Embry Livestock was conducting business in such a way as to violate the Act. (Tr. 785, 918). Although the action filed against Embry Livestock in 1983 had some similarities with the present action, it was significantly different. The action filed in 1983 alleged that Embry Livestock was misleading its packer customers by changing the prices shown on scale tickets and invoices from the true and correct prices; - that action did not attempt to equate a service charge with a commission. The uncontroverted evidence in this case also shows that Embry Livestock meet with officials of the Packers and Stockyards Administration in Springfield, Illinois, and in Washington, D.C. seeking guidance as to how Embry Livestock should conduct it business as a dealer in such a way as to satisfy the Packers and Stockyards Administration. (Tr. 558-560, 698-699, 724, 726, 733, 786). It received virtually no guidance whatsoever, much less anything in writing. When Embry Livestock presented a revised invoice form to officials of the Packers and Stockyards Administration, those officials not only failed to comment, but *refused* to comment regarding the revised invoice format. (Tr. 786). When Embry Livestock attempted to obtain guidance from Packers and Stockyards Administration officials in Washington, it received virtually no substantive guidance.

Embry Livestock's actions do not show an obvious willfulness to violate the Act; they show an obvious effort to comply with the Act and the interpretation

that the Packers and Stockyards officials have placed on the Act, including the Chief's unpublicized 1949 memorandum.

It should be further noted in this case that neither the Act nor the regulations are sufficiently enlightening with respect to the specifics which would differentiate a Market Agency and a dealer in regard to the matters here at issue. There is no question but that Respondent Embry Livestock sought to comply with the 1983 decree. Obviously the corporate Respondent did not do so to the satisfaction of the Agency. If the Agency is attempting rule making through this *ad hoc* decision, it is believed that this is not an appropriate vehicle to accomplish that purpose.

Other issues have been raised in this proceeding and due consideration has been accorded thereto but they will be dealt summarily herein.

Throughout the hearing, and on brief, Respondents invoked the Jencks Act, 18 U.S.C.A. § 3500, requesting that all "statements" that related to Complainant witnesses' testimonies be produced. While usually applicable in criminal proceedings, the Jencks Act has been adopted by the United States Department of Agriculture, Packers and Stockyards Administration in its Rules of Practice at 7 C.F.R. section 1.141.(g)(1)(iii) (1985). During the hearing, the Complainant maintained that the government complied promptly and thoroughly with Respondents' requests. However, the Respondents were not of the same impression and wished to see and have produced transmittal memorandum sent between the field office and the Washington office of the Packers and Stockyards Administration, the transmittal memoranda sent from the Packers and Stockyards Administration to the Office of the General Counsel, as well as the investigatory report that was submitted by the investigators. The Agency argued that none of this material constituted a "statement" under the Jencks Act. The Respondents maintained otherwise and moved to dismiss the actions because of the failure of the government to produce the requested material.

Both parties have argued their respective position extensively, and thoroughly on brief - and such presentations will not be reiterated herein but are incorporated by reference.

Briefly stated, whether a disputed document is a "statement" and whether the disputed document is related to the subject matter of a witness' testimony, are matters for the Court to decide. These questions are not for the government to decide. *United States v. Wables,* 731 F.2d 440, 445 (7th Cir. 1984). Nor, do I do not believe that the government's failure to produce the requested documents for *in camera* inspection was harmless error.

When a Court orders the government to produce documents for *in camera* inspection, and the government "elects not to comply" with the order, the Court has no choice pursuant to 18 U.S.C. section 3500(d):

> It shall strike from the record the testimony of the witness. The "elects not to comply" test is met when the Government makes a "conscious choice" not to disclose a witness's pre-trial statement. *United States v. Wables,* 731 F.2d at 446.

I believe it would be error for me to conclude that the failure of the government to produce the investigatory file was harmless error, in the absence of a submission of that file and the requested documents for *in camera* inspection. Courts cannot speculate whether Jencks Act material could have been utilized effectively at trial. *United States v. Allen*, 798 F.2d 995 (7th Cir. 1986).

In summary, I believe the government violated the Jencks Act in not producing the documents requested in what is described as an investigatory file. I believe the proper procedure would have been for the government to produce such file for *in camera* inspection and then, depending upon the ruling thereon, such documents could either have been made available to the Respondents, particularly with respect to the cross-examination of Mr. Rielly and Mr. Grise, or, if the Judge so ruled, they could not have been produced but would have been retained and put under seal, where they would have been available to both the Judicial Officer and the Federal Courts for review as to the correctness of the ruling.

However, in view of the fact that it is found herein that the Agency has not sustained its burden of showing that the Respondents violated the Act and were not acting as dealers, this shortcoming by the government does not take on the material importance which otherwise might have been attributed thereto.

Various other contentions have been raised by the parties, including the one that Respondents must be accorded due process. This is recognized by the Administrative Law Judge. To the extent such other contentions have not been specifically enumerated herein, they have been given consideration and have been found not of material importance to the outcome of this particular case.

A careful analysis of the entire record of this proceeding indicates that Embry Livestock was not operating as a market agency. It never intended to so do; it had filed no tariff; and, although there were a number of packers who indicated they thought it might have been operating as such, nevertheless, the weight of the credible evidence indicates that Embry Livestock sought to and did in fact operate as a dealer.

A question was raised initially by the Respondents as to whether or not, in this proceeding, the Complainant could proceed to attack the procedures used by the Respondent Embry Livestock in its dealer operations, inasmuch

Respondent Embry Livestock, or any of the individual Respondents have not abided by the 1949 memorandum or any other applicable regulations of the Packers and Stockyards, a cease and desist order is appropriate to require such compliance. Any greater sanction or a suspension of any kind herein would be a miscarriage of justice. It is obvious that responsible persons from Embry Livestock sought to comply with the requirements of operating as a dealer. They sought out advice, which apparently was not forthcoming.

Because any violation of the Packers and Stockyards' regulations, or as a practical matter, the Packers and Stockyards' interpretation thereof is a most serious matter, the Respondents must be held to the highest degree of care in ascertaining what are the requirements of the Packers and Stockyards Administration with respect to its operations as a dealer. Accordingly, the Respondents must ascertain, with considerable emphasis on detail, the Packers and Stockyards' approved format for invoicing, an approved door sign and perhaps give *written* notification to anyone to whom it sells, that it is indeed operating as a dealer. Because it may not have taken this high degree of care and emphasis in the past, particularly to achieve full compliance with the 1983 Consent Decision, and as interpreted by the unpublicized 1949 Chief's memorandum, the following order is appropriate under the circumstances and the entire record herein.

Order

With respect to Respondents Darwin Koehler, Russ Mohn, Dale Carlson Ron Jenkins, and Clarence Swalve, the Complaint is dismissed with prejudice.

Respondent Embry Livestock Company, Inc., its agents and employees, directly or through any corporate or other device, in connection with its operation subject to the Act, shall cease and desist from:

1. Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings or any other documents showing false, inaccurate or misleading prices or weight entries for such livestock;

3. Inserting or failing to insert in accounts of purchase, invoices, billings or any other documents prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole, or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction;

4. Collecting payment from the purchasers of livestock, or aiding and assisting any person to collect from the purchasers of livestock, on

the basis of false, inaccurate or misleading accounts of purchase, invoices or billings; and

5. Misrepresenting to buyers of livestock the terms and conditions under which livestock are being sold to them.

Respondent Embry Livestock Company, Inc., shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its business subject to the Packers and Stockyards Act, including but not limited to accounting, invoices, billings and scale tickets which show the true and correct weights, prices, and shrinkage allowances of livestock.

All motions, contentions, and requests of the parties have been duly considered, and to the extent not specifically ruled upon in this decision or to the extent, if any, they are inconsistent herewith, they are hereby denied.

This Decision and Order will become final Thirty-Five days after service thereof unless appealed to the Judicial Officer within Thirty days as provided for in the Rules of Practice and Procedure (7 C.F.R. § 1.130 *et seq.*).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 3, 1989.-Editor]

In re: EMBRY LIVESTOCK CO., INC., CLARENCE SWALVE, DARWIN KOEHLER, RUSS MOHN, DALE CARLSON and RON JENKINS.
P&S Docket No. D-88-31.
Order Denying Respondents' Request to Set Aside Extension of Time filed November 15, 1989.

Allan R. Kahan, for Complainant.
Ernest H. Van Hooser and Daniel G. O'Day, for Respondents.
Order issued by Donald A. Campbell, Judicial Officer.

On November 13, 1989, respondents objected to the Judicial Officer's order granting an extension of time for the filing of complainant's appeal, on the grounds that complainant's requests did not state the "grounds therefor" (7 C.F.R. § 1.143(c)), and respondents were not afforded an opportunity to submit views concerning the request. Respondents' request is denied. There are at present 20 cases pending in the Office of the Judicial Officer, four of which (all Packers and Stockyards Act cases) have been pending before the Judicial Officer for 15 to 18 months. Considering the well-known backlog in the Office of the Judicial Officer, in a case that does not require immediate action because of some peculiar circumstance affecting the public interest, it is sufficient "grounds" in support of a motion for a 30-day extension of time in which to file an appeal for the party to state that the extension is desired. No additional reason is necessary since the case will not be heard or considered by the Judicial Officer for many months, or perhaps for more than a year. Accordingly, all such requests for extensions of time by Department attorneys or by private attorneys have been routinely granted without

burdening the opposing party with the opportunity to submit views concerning the request. This practice will continue, at least until the backlog in the Office of the Judicial Officer has been eliminated.

Order

Respondents' request to set aside the Order extending the time within which complainant's appeal may be filed is denied.

In re: ROBERT F. JOHNSON.
P&S Docket No. D-88-103.
Decision and Order filed October 5, 1989.

Unfair or deceptive practice - Nonpayment - Severe sanction.

Allan R. Kahan, for Complainant.
James F. Crews, for Respondent.
Decision and Order issued by Paul Kane, Administrative Law Judge.

A complaint filed on September 30, 1988, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleges that respondent violated the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*, referred to herein as the Act) by issuing insufficient funds checks for livestock he purchased. The complaint also alleges that respondent violated the Act by failing to pay, when due, for such livestock and that respondent failed to keep and maintain records disclosing transactions in business he conducted under the Act.

On October 25, 1988, respondent filed an answer and on July 25, 1989, a hearing was held in Jefferson City, Missouri. Complainant was represented by Allan R. Kahan, Esq. Respondent was represented by James F. Crews, Esq.

Findings of Fact

1. Respondent, Robert F. Johnson, is an individual whose business mailing address is P.O. Box 101, Martinsburg, Missouri 65264. (Respondent's Answer.)

2. Respondent at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis. (Respondent's Answer.)

3. Respondent, during the period December 11, 1987, through January 26, 1988, in the transactions set forth in paragraph II of the complaint, purchased livestock from various market agencies and issued checks in purported payment for the livestock which checks were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented for payment. (CX 4-9; Tr. pp. 9-29, 33-38, 57-64, 74-78 and 85-96.)

4. Respondent, on or about the dates and in the transactions set forth in paragraph 3 above and in the transactions set forth in paragraph III of the complaint, purchased livestock from various market agencies and failed to pay, when due, for such livestock. (CX 9; Tr. pp. 9-29, 33-38, 57-64, 74-78 and 85-96.)

5. As of July 25, 1989, there remained unpaid a total of approximately $106,803.11 for the livestock transactions set forth in paragraphs 3 and 4 above, after the proceeds of the surety bond was distributed to the claimants. (Tr. pp. 20, 40, 65, 78-79 and 100.)

6. Respondent, during the period December 11, 1987, through February 5, 1988, failed to keep and maintain accounts, records and memoranda which fully and correctly disclosed all transactions involved in his business under the Act. (Tr. pp. 126-131)

7. By letter dated September 20, 1972, respondent was notified of the prompt pay provisions of the Act, set forth at section 201.43(b) of the regulations (9 C.F.R. § 201.43(b)), which required payment for livestock purchased ". . . before the close of the next business day following the purchase of livestock . . .". (CX 1.)

8. By letter dated November 15, 1985, respondent was notified that issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn, was considered a serious violation of the Packers and Stockyards Act. (CX 2.)

9. By letter dated July 9, 1986, respondent was again informed of the payment requirements of the Act, as well as being informed of the recordkeeping requirements of the Act, specifically directing him to maintain a system of records which fully discloses all purchases and sales. (CX 3.)

10. Respondent filed for bankruptcy and received a "Discharge of Debtor" on December 20, 1988. (Tr. 184.)

Discussion

The sections of the Act involved in this proceeding are § 312(a) (7 U.S.C. § 213(a)), § 409 (7 U.S.C. 228b), and § 401 (7 U.S.C. § 221).

Section 312(a) provides that it shall be unlawful for a dealer to use an unfair or deceptive practice in operating at the stockyards, or with receiving, marketing, buying or selling on a commission basis. Persons subject to the Act who failed to make full and prompt payments for livestock they purchase are considered to have engaged in or used "unfair" and "deceptive" practices. *Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977).

Section 409 requires dealers to pay for livestock they purchase before the close of the next business day following the purchase, but providing that the parties to the purchase may expressly agree in writing before the sale to effect payment in another manner.

Section 401 provides that dealers shall keep "such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business."

Complainant contends that respondent wilfully violated these provisions and, as a sanction, seeks a cease or desist order, an order requiring respondent to keep appropriate records, and suspension of respondent's registration under the Act for five years. Complainant also asks that the order provide that a supplemental order may be issued after 210 days to permit respondent's salaried employment by another registrant.

Respondent's counsel, in an argument presented at the hearing (in lieu of filing a brief), does not refute the essential facts showing that respondent violated the Act, but argues that mitigating factors should be taken into account in considering the sanction to impose. He contends that respondent did not intentionally violate the Act, that the violations occurred largely because of faulty bookkeeping, and that respondent's bankruptcy should be taken into account.

Respondent, when questioned at the hearing about his recordkeeping practices, said he kept copies of the bills that he sent to the buyers for whom he bought cattle and wrote information concerning the sale on his copy (e.g., number of cattle and their weight). He also said that he sometimes forgot to write down such information, but that he had a bookkeeper, which he apparently started using in 1986 after being told that his records were not satisfactory (CX 3), who maintained a ledger. The bookkeeper, however, went over the ledger with respondent only two or three times a year, so that respondent didn't always know his financial condition from month to month (Tr. 127-128, 189). The ledger was not offered in evidence to show whether respondent's accounts and transactions were kept correctly as required by section 401.

Respondent also thought that the bookkeeper, who received his monthly bank statements, was keeping track of whether he was being paid on time. Respondent said that about December 1987 the bookkeeper implied that his financial condition was satisfactory but that "it wasn't long after that I didn't have any money, didn't know where it was. I owed everybody in town. So I'd have to disagree with you on losing money because according to my records, I wasn't." (Tr. 132.)

When asked what had happened to the money, he replied, "I haven't figured that out yet." However, he did suspect that either he was never paid by a buyer for a purchase of approximately $135,000, or the bank that he first started doing business with in 1986 did not credit his account when the bank received the money (Tr. 133-134, 180-181). It was during this period, December 1987 - February 1988, that he was unable to pay for the cattle he purchased.

As a witness, respondent was not disingenuous. He appeared to be truthful in saying that he just did not know what had happened to the money

and although his negligence in failing to pay closer attention to his ongoing financial condition and in failing to maintain proper records of his transactions and accounts directly led to his inability to pay for his livestock purchases, there is no evidence that he intended to violate the Act. Even the testimony of the people who lost money because of respondent's financial failure did not accuse him of being dishonest. It is found, therefore, that respondent did not consciously intend to engage in any misbehavior.

The Department, however, has held repeatedly that a respondent's lack of malfeasance is not a defense. As stated in *Sam Odom*, ___ Agric. Dec. ___ (P&S Docket No. 6866, 5/4/89), "it is emphasized that severe sanctions should be imposed in nonpayment cases, even where there was no misbehavior (such as fraud) by the respondent."

Moreover, according to established Department authority, respondent's violations are also wilful. In determining wilfulness, a complainant does not have to prove that respondent intended to engage in unlawful conduct; he need only prove that respondent engaged in conduct that is legally prohibited. *Mid-States Livestock*, 37 Agric. Dec. 547 (1977). Motive is irrelevant and, for that matter, a person breaks the law even though he doesn't necessarily know that his conduct is legally prohibited. *George Sirota and Sons, et al.*, 12 Agric. Dec. 825 (1953). As for respondent's bankruptcy, the Bankruptcy Act (11 U.S.C. § 525) specifically exempts suspensions under the Packers and Stockyards Act. Respondent's bankruptcy is therefore not a mitigating consideration.

Accordingly, it is found that respondent's violations were wilful.[3]

Conclusions

Respondent wilfully violated the Act (7 U.S.C. § 181 *et seq.*) by issuing insufficient funds checks for livestock he purchased, by failing to pay when due, for livestock he purchased, and by failing to keep accounts, records and memoranda that fully and correctly disclosed all transactions involved in his business subject to the Act.

The severe sanction of a five year suspension sought by complainant will be imposed as required by the Department policy. *Farmers and Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 235 (1986).

I also find that, as respondent is a 60 year old man whose only employment has been in order buying (Tr. 178), and considering all the other circumstances of the case, he should be barred from employment as a salaried employee of another registrant for 90 days.

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[3]Respondent's violations are wilful even assuming that he did not know in December 1987 that he had insufficient funds to cover his purchases. After his checks started to be returned for insufficient funds later that month (CX 9), respondent was effectively put on notice that his finances were in trouble. His conduct thus became wilful when he voluntarily continued to make purchases at a time that he knew or certainly should have known he had insufficient funds to cover his purchases.

Order

Respondent Robert F. Johnson, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account from which such checks are to be paid to pay such checks when presented; and

3. Failing to pay the full purchase price of livestock purchased.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Act, including: (1) purchase invoices for both his auction market and country livestock purchases; (2) load preparation records which show livestock sold and where the livestock was procured; (3) records which indicate how and in what manner livestock was paid for; (4) invoices for trucking and transportation expenses incurred; (5) sales invoices; and (6) all voided and canceled checks.

Respondent Robert F. Johnson is suspended as a registrant under the Act for a period of five (5) years, provided, however, that this order may be modified after 90 days to permit respondent's salaried employment by another registrant.

Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to this proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final November 21, 1989.-Editor]

In re: WILKES COUNTY STOCK YARD, INC.
P&S Docket No. 6807.
Decision and Order filed December 19, 1989.

Speculative resale - Rates - Unfair trade practice - Consignment - Severe sanctions policy.

The Judicial Officer affirmed Chief Judge Palmer's (ALJ) order requiring respondent to cease and desist from permitting its ringman or any other employees engaged in the actual conduct of auction sales to purchase livestock out of consignment to fill orders or for speculative resale; issuing accounts of sale which fail to show the true and correct names and relationship to respondent of any employee purchasing consigned livestock; and charging, demanding or collecting a greater, less or different compensation for stockyard services furnished by it as a posted stockyard than the rates and charges filed with the Secretary of Agriculture and in effect at the time such services are furnished. The Judicial Officer increased the ALJ's civil penalty of $3,000 to $5,000. But the Judicial Officer denied complainant's request for a 28-day suspension order. Permitting respondent's gateman, who performed duties comparable to that of a ringman, to purchase livestock to fill orders constituted an unfair trade practice. The ALJ's

findings are supported by more than a preponderance of the evidence, which is all that is required. Great reliance is placed on the ALJ's determinations as to respondent's explanations for the transactions under scrutiny. Willfulness is not an issue where there is no suspension or revocation order. Duties of ringmen discussed. Severe sanction policy explained. Evidence as to the nature and effect of respondent's conduct involving the purchases by its gatekeeper should have been received, as well as submissions to the Department in connection with the notice and comment rulemaking as to the regulation at issue. The regulation prohibiting certain purchases from consignment is legislative in nature.

Sharlene W. Lassiter, for Complainant.
Gerard D. Eftink, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).[1] An initial Decision and Order was filed on February 2, 1988, by Chief Administrative Law Judge Victor W. Palmer (ALJ) ordering respondent to cease and desist from permitting its ringman or any other employees engaged in the actual conduct of auction sales to purchase livestock out of consignment to fill orders or for speculative resale; issuing accounts of sale which fail to show the true and correct names and relationship to respondent of any employee purchasing consigned livestock; and charging, demanding or collecting a greater, less or different compensation for stockyard services furnished by it as a posted stockyard than the rates and charges filed with the Secretary of Agriculture and in effect at the time such services are furnished.

The ALJ's order assesses a civil penalty of $3,000.

On April 8, 1988, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On May 19, 1988, respondent filed a reply to complainant's appeal, which also contains a cross-appeal. The case was referred to the Judicial Officer for decision on May 26, 1988.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with changes or additions indicated by brackets, and omissions indicated by dots. The civil penalty is increased from $3,000 to $5,000. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

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[1] *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, gricultural Law, ch. 3 (1981 and 1989 Cum. Supp.), and Carter, *Packers and Stockyards Act*, ir) Harl, Agricultural Law, ch. 71 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C § 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 J.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in Januar 971, having been involved with the Department's regulatory programs since 1949 (including 7 'ears' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prio udicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program December 1962-January 1971).

[AS MODIFIED]
Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 USC §§ 181-229; hereafter "the Act"), instituted by a complaint filed on December 15, 1986, by the Administrator of the Packers and Stockyards Administration, United States Department of Agriculture.

The administrator's complaint alleges that the respondent, a Georgia corporation registered as a posted stockyard and a market agency under the Act, wilfully violated various sections of the Act (7 USC §§ 206, 207, 208 and 213(a)) by (1) collecting compensation for its stockyard services that differed from the schedule of rates of charges then in effect and filed with the Department; (2) permitting an employee who performed the duties of a ringman to purchase for his own speculative account, livestock consigned to the respondent as a market agency for sale on a commission basis; (3) permitting the "ringman" to purchase livestock out of consignment from the respondent market agency for which accounts of sale were issued that failed to identify the relationship existing between respondent and the buyer; and (4) issuing accounts of sale to the consignors of livestock sold to the "ringman" which showed fictitious names or designations for the buyers instead of the true buyers.

Respondent filed an answer on January 9, 1987, in which it admitted the jurisdictional allegations and that it had charged a different rate for stockyard services than the rates specified in its schedule of rates and charges filed with the Secretary of Agriculture, but denied it did so wilfully, and denied allegations that it violated the Act by unfair, unjustly discriminatory or deceptive actions.

Telephone conferences were held on April 14 and September 16, 1987, which resulted in the scheduling of a prehearing exchange of exhibits and witness lists and a deadline for completion of settlement negotiations and the filing of stipulations or admissions. Settlement negotiations having failed, an oral hearing was held before me on October 8, 1987, in Augusta, Georgia. Sharlene Lassiter, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant. Gerard D. Eftink, Van Hooser, Olsen & Parkinson, P.C., Kansas City, Missouri, appeared on behalf of the respondent.

At the commencement of the hearing, a stipulation and agreement for entry of a partial consent order was filed wherein it was agreed that a cease and desist order, and no other sanction, should be entered in respect to respondent's collection of different compensation for its stockyard services than the rates and charges filed with the Secretary of Agriculture and in effect at the time of the delivery of such services.

At the conclusion of the hearing, the parties were given until December 1, 1987, to file proposed findings, conclusions and supporting briefs. Subsequent to the hearing, the briefing schedule was extended and respondent requested that official notice be taken of various documents filed during the "notice and comment" period which preceded the 1984 modification of the

regulation contained in 9 CFR § 201.56 which identified "ringmen" as "key employees" who a market agency should not permit to purchase livestock out of consignment. Upon consideration of this request and complainant's objection, it was denied. Briefing was completed on January 15, 1988.

For the reasons set forth in the findings and conclusions that follow, an order is being entered directing respondent to cease and desist from collecting different compensation for its stockyard services than the rates and charges filed with the Secretary of Agriculture and in effect at the time such services are furnished; permitting any employee engaged in the actual conduct of auction sales, including its auctioneers, weighmasters and ringmen, to purchase livestock out of consignment to fill orders or for speculative resale; [and] issuing accounts of sale for consigned livestock purchased by any owner, officer, agent, or employee of the respondent market agency which fail to disclose the name of the buyer and the buyer's relationship to the market agency. Respondent is also being assessed a civil penalty of [$5,000.00].

[Granting] of Request For Reconsideration of Ruling on Official Notice Request

Upon reconsideration of respondent's request for official notice to be taken of various comments filed in the 1984 rulemaking action amending regulation 201.56, the request is [granted].

The Judicial Officer has ruled that [some] regulations under the Act are advisory only, relying upon *United States v. Donahue Bros.*, 59 F.2d 1019, 1021-1022. *See Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1600-1602 (1976); and *Lester Murtha*, 21 Agric. Dec. 1213, 1215 (1962). Federal courts have accepted this as the official Departmental policy in *Central Coast Meats, Inc. v. U.S.D.A.*, 541 F.2d 1325, 1326 (9th Cir. 1976) and *Farrow v. U.S.D.A.*, 760 F.2d 211, 213 (8th Cir. 1985). Under this policy, such regulations have the limited authoritative effect of the kind of rules Professor Davis describes as "interpretative" which lack the finality of "legislative" rules. *Davis*, "Administrative Law Treatise," §§ 7.8 - 7.15, 2nd edition, 1979. Noncompliance with one of these regulations is not considered to be a *per se* unfair trade practice, and independent evidentiary proof is received to establish the unfairness of the practice under the Act itself. *See Sterling Colorado Beef Co., supra* at 1601-1602.

Accordingly, respondent has proposed that it is appropriate for me to take official notice of, and consider afresh, the antithetical comments received by the Secretary during the notice and comment period preceding the 1984 issuance of 9 CFR § 201.56, as amended.[3]

Since the comments are part of the Department's official rulemaking file relating to the regulation, they are, in effect, "legislative history," similar to

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[[3]The ALJ disagreed, stating: "Inasmuch as complainant may not rely on the regulation itself but is obliged to present sworn testimony subject to cross-examination to establish the intrinsic unfairness of the proscribed conduct, respondent should likewise not be allowed to assert any of the contrary views rejected when the regulation was issued, without the spokesmen of those views also being under oath and subject to cross-examination."]

views expressed at Congressional hearings, and official notice will be taken of the comments.

Findings of Fact

1. Respondent, Wilkes County Stock Yard, Inc, is a corporation organized and existing under the laws of the State of Georgia. Its business address is: P.O. Box 520, Washington, Georgia 30673

2. Respondent is, and at all times material, was:

a) Engaged in the business of conducting and operating the Wilkes County Stock Yard, Inc., a posted stockyard under the Act;

b) Engaged in the business of buying and selling livestock on its own account; and

c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and a dealer to buy and sell livestock on its own account.

3. The president of the respondent corporation is State Senator Samuel P. McGill, who has been sole owner of the corporation since his wife's death. Senator McGill enjoys an excellent personal reputation in his community and throughout the State of Georgia, and there is no evidence suggesting that he is anything other than personally honest and veracious.

4. Graydon Bobo is and, at all times material herein, was the manager in charge of the daily operating activities of the respondent. On the weekly, Wednesday sale day, when the respondent auctioned consigned livestock, Mr. Bobo acted as the market's clerk.

5. Joseph W. Willis, at all times material herein, was employed by the respondent as a member of the sales team in the auction arena. He was paid $100 (gross) for each sale day he worked. His functions included opening and shutting the gate to the ring where the livestock were exhibited for sale; moving them in and out of the ring; . . . identifying for the auctioneer by hand signals, whether each cattle was a steer, heifer or bull [; and, when one of several hogs in the ring was being sold individually, walking onto the scale to point to the particular hog being sold (Tr. 210-11, 230-33)]. Mr. Willis did not start bids, and did not spot bids. He accordingly performed [some] of the functions of a "ringman", but not all. Mr. Willis is no longer employed by respondent.

6. During the period April 24, 1985 through July 24, 1985, Joe Willis purchased, in 15 separate transactions, livestock consigned to the respondent market agency for sale on a commission basis, at the weekly auctions in which he participated as a member of the sales team.

7. The livestock Willis purchased consisted primarily of "odd lot hogs", in addition to some cattle. Willis purchased the hogs on behalf of the C & S Livestock Company; he purchased them out of the ring actively bidding against at least one other bidder. The hogs were purchased by Willis to fill

orders received from C & S Livestock which paid Willis $.50 per cwt compensation on the transactions which Willis considered to be a commission; he did not purchase the hogs for speculation. The cattle he purchased through bidding at the auction consisted of light calves or sick calves which he took to his farm for feeding and later sale when fattened. Willis also purchased some cattle for neighbors. When Willis purchased livestock from consignments, the auctioneer announced that "WW" or "C & S" was the buyer; the auctioneer did not state that Joe Willis had made the purchase.

8. Accounts of sales issued by respondent to consignors for livestock purchased by Willis did not designate Willis as the buyer but instead designated the buyer as "WW."

9. On September 20, 1976 and March 20, 1981, respondent received warning letters by certified mail regarding the prohibition then expressed in 9 CFR § 201.57, against a market agency allowing its auctioneers, weighmasters, or other employees performing duties of comparable responsibility to purchase livestock out of consignments for any purpose. [The regulation at that time did not specifically refer to ringmen, but ringmen were regarded by the Department as being subject to the prohibition.] The letters were received on respondent's behalf by Senator McGill's son, Sam C. McGill. Subsequently, a co-owner and auctioneer, Mr. McClendon, who was purchasing livestock out of consignment, was removed from respondent's payroll and Senator McGill sold his interest in another market located in Saluda, [South Carolina (Tr. 204),] which he owned with McClendon, to McClendon, while at the same time, Senator McGill bought out McClendon's interest in the respondent corporation.

10. Senator McGill did not have personal knowledge that Willis was buying livestock out of consignment. However, the corporation's manager and auction sales clerk, Mr. Bobo, did have such knowledge. Willis went to Bobo, apparently in April or May 1985, and told him he could get the C & S order to buy hogs and Bobo, on behalf of the respondent corporation, gave Willis permission because he believed it would make a more competitive market of benefit to consignors. [Just before Willis began buying "odd lot hogs" for C&S, one of the buyers who had been purchasing "odd lot hogs" at respondent's market was no longer permitted to do so, because he was unable to pay for about $15,000 to $20,000 worth of hogs, leaving only a few buyers at respondent's market interested in buying "odd lot hogs."] Mr. Bobo testified that Willis' active bidding on hogs increased the average price paid by approximately 10 cents per cwt.

11. Prior to Willis receiving permission from Bobo to purchase livestock out of consignment, the Department of Agriculture, based upon notice and comment rulemaking and its reasoned consideration of the various positions advanced by industry members, replaced 9 CFR § 201.57 with a new trade practice regulation which it promulgated on February 17, 1984 as 9 CFR § 201.56, which in pertinent part provides:

> "(c) Market agencies not to speculate on purchases from consignments. No market agency engaged in selling livestock on a commission basis shall purchase livestock from consignments to such

market agency for speculative resale, and no such market agency shall permit its owners, officers, agents, employees, or any firm in which such market agency or its owners, officers, agents, or employees have an ownership or financial interest to purchase livestock from consignments to such market agency for speculative resale; PROVIDED, That this paragraph shall not be construed to prohibit a market agency from purchasing livestock for its own account to support the market when necessary to protect the legitimate interests of its consignors.

(d) Key employees at auction sales not to purchase livestock out of consignments to fill orders or for speculation. No market agency engaged in selling livestock at auction shall permit its auctioneers, weighmasters, ringmen, or other employees performing duties of comparable responsibility in connection with the actual conduct of the auction sales, to purchase livestock out of consignment for their own account, directly, or indirectly, for speculative resale or to fill orders on an agency basis.

(e) Purchase from consignments; disclosure required. When a market agency purchases livestock consigned to it for sale to fill orders or to support the market, or sells consigned livestock to any owner, officer, agent, employee, or any person in whose business such market agency, owner, officer, agent, or employee has an ownership or financial interest, the market agency shall disclose the name of the buyer and the nature of the relationship existing between the market agency and the buyer. Such disclosure shall be made on the account of sale and the name of the buyer shall be publicly announced at the time of sale."

[A copy of the regulation was mailed to respondent on March 14, 1984 (CX 23, p. 1, 1st sentence).]

12. The Atlanta, Georgia Regional Office, Packers and Stockyards Administration, sent a notice, dated April 17, 1984, (Cx. 23) to respondent to clarify the disclosure requirements of section 201.56(e) when a market agency, an officer, owner or employee purchases from consignment. The notice, which respondent received, explained that "the name of such a buyer must be announced at the time of sale and disclosed to the consignor on the account of sale."

13. The respondent has admitted the allegations contained in paragraph IV of the complaint pertaining to its charging clients for stockyard services furnished at different rates than those specified in the schedule of rates and charges then in effect and filed with the Secretary of Agriculture. The allegations contained in paragraph IV are incorporated as part of this finding as fully as if set forth in detail.

Conclusions

1. Complainant failed to prove the allegations of its complaint that the purchase of livestock out of consignment by Joseph W. Willis, [alleged to be] respondent's ringman, was essentially for personal speculation and for that reason, constituted an unfair trade practice. Complainant also failed to prove that respondent issued accounts of sale to consignors which showed fictitious names in place of Willis'.

2. Joseph W. Willis was a member of the sales auction team who, while not performing all the duties associated with a ringman, nonetheless was the type of employee performing duties of comparable responsibility, who should be precluded from purchasing livestock out of consignment for his own account [for speculative resale, or] to fill orders on an agency basis. . . . Respondent, by permitting this insider to purchase livestock out of consignment [on an agency basis], committed an unfair practice under the Act.

3. Respondent committed an unfair practice under the Act through its failure to disclose Joseph W. Willis' name [at the sale, and his name] and the fact that the livestock was purchased by an employee of the respondent on the accounts of sale furnished consignors.

4. Respondent failed to comply with requirements of the Act when it charged, demanded and collected greater, less or different compensation for stockyard services furnished by it as a posted stockyard than the rates and charges specified in the rates and charges then in effect and filed with the Secretary of Agriculture.

5. (a) An order should be entered requiring respondent to cease and desist from and in the future not engage in the activities specified in numbered conclusions 2, 3 and 4.

(b) In accordance with the stipulation of the parties, no additional sanction should be imposed for respondent's failure, as a posted stockyard, to charge in accordance with the rates and charges it had filed with the Secretary of Agriculture.

(c) Upon consideration of the gravity of the offenses, the size of the business involved and the effect of the penalty on the respondent's ability to continue in business, a civil penalty of [$5,000.00] appears warranted for respondent's conduct in permitting an insider employee to participate as a buyer in the auction and purchase livestock out of consignment [on an agency basis], and for its failure to inform consignors that their livestock had been sold to an insider employee. The requested 28-day suspension of respondent as a registrant under the Act appears excessive and unwarranted.

Discussion

The complaint alleged, but the evidence of record failed to prove, that the consigned livestock purchased by Joseph W. Willis was essentially bought for speculative resale. To the contrary, the . . . evidence respecting Willis' use of the livestock he purchased out of consignment was that, other than for some minor purchases of calves, usually purchased for his farm or for friends, [and on one occasion three sheep bought and sold for speculative resale at a

Leesville, South Carolina, market,] he principally bought "odd lot hogs" for the C & S Livestock Company for which he was paid a commission based on weight only. His purchasing of hogs, if [it had been] engaged in directly by the market, [and if there had been a showing that without his purchases consignors would not have received fair market value for their hogs, would have] had many of the beneficial aspects of market support activity, which the Department encourages. [But, as practiced by Willis here, it still did not fulfill the requirements for *bona fide* market support under the regulations (9 C.F.R. § 201.56(e)).]

[P]ermitting his purchasing activity constituted an unfair trade practice under the Act. *Eric Loretz*, 36 Agric. Dec. 1087, 1102-1103 (1977); and *Smithfield Livestock Market*, 36 Agric. Dec. 1546, 1566-1568. Whenever an employee associated with a market's auction sales team is permitted to purchase out of consignment for [speculative resale or to fill orders on an agency basis], other buyers are discouraged from participation in the sale because of the fear that the insider's bids will be preferred by the auctioneer who may cut off bidding or prolong it, as the case may be, to give the employee advantage over other bidders. This ultimately works to the disadvantage of consignors and for that reason the prohibition against the practice contained in 201.56(d) is a salutary policy, the observance of which operates to preserve trustworthy and fully-competitive markets. A cease and desist order precluding this practice by respondent in the future should therefore be entered.

The respondent's use of cryptic symbols on its accounts of sales to consignors which did not specifically reveal Willis, its employee, was the buyer, [and respondent's failure to announce Willis as the buyer at the sale, were] directly contrary to paragraph (e) of the other relevant regulation (201.56(e)). Inasmuch as respondent never made known to consignors that their livestock was purchased by its employee, it committed an unfair practice in violation of the Act. *See Smithfield supra*, at 1570, as interpreted in *Herbert Lowery*, 37 Agric. Dec. 1872, at 1878 (1978). The practice operates to deny information consignors need to determine whether they should continue to patronize a market which allows insiders to actively bid on consigned livestock. Again, a salutary policy was not complied with and again a cease and desist order should be issued.

Complainant requested a 28-day suspension of respondent as a registrant under the Act in conformity with its policy of seeking a suspension of four (4) weeks for a violation involving "speculating out of consignment." (Tr. 249-250). Here, the evidence largely failed to support this contention, and accordingly, the requested suspension is unwarranted.

The offenses are not in any sense minor, but neither are they as grave as the kind complainant believed it had discovered. Respondent was not aiding an employee to purchase livestock for personal speculation whereby consignors were denied the full, present value of their livestock. Nor were consignors intentionally deceived by being given false information. Instead, respondent committed the lesser offenses of failing to provide information a prudent consignor would require, and of permitting cautious, prospective bidders to be discouraged from participating in the auction sales because an insider was allowed to bid. On the other hand, a cease and desist order

standing alone would not be a sufficient sanction to deter other markets from permitting similar undisclosed, insider trading on consigned livestock. Moreover, respondent had prior knowledge of the Department's position on these practices. A civil penalty of an appropriate amount should therefore be assessed.

The parties agreed that the market has a profit of approximately $1,000.00 per sale day or $50,000.00 per year. A civil penalty of [$2,500.00] for each type of unfair practice, or [$5,000.00] total, appears sufficient, appropriate and warranted when one considers the gravity of the offenses, the size of the business and the effect of such a penalty (loss of [five (5)] sales day profits) on respondent's ability to continue in business.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

In rearguing issues on appeal, which were correctly decided below by the ALJ, both complainant and respondent contend that the evidence does not adequately support the ALJ's findings of fact, but there is more than a preponderance of the evidence, which is all that is required.[4]

In reviewing the record in this proceeding, I was struck with some similarities to another case, *In re Roberts Enterprises, Inc.*, 41 Agric. Dec. 80 (1982) (in which only a cease and desist order was issued). While the facts, of course, are not exactly the same, my approach herein will closely follow the *Roberts* decision's reasoning. Both cases are of the type where the Judicial Officer places a great deal of reliance on determinations by the ALJ, who had the opportunity to see and hear the witnesses, particularly respondent's explanations for the transactions under scrutiny.

In *Roberts*, I was concerned with the *nature* and *degree* of the violations, because the complainant, as here, was seeking a substantial suspension penalty. Since I will be referring back to *Roberts*, I believe it would be helpful to reproduce my *Conclusions* here, as follows (*In re Roberts Enterprises, Inc.*, 41 Agric. Dec. at 83-84):

CONCLUSIONS

> It is undisputed that on many occasions, when respondent was consigning large numbers of his own livestock for sale at an auction market and also purchasing large numbers of livestock at the same market for principals, respondent repurchased his own animals on occasions without disclosing his ownership to his principals. That is a violation of his fiduciary obligation as an agent, an unfair and deceptive practice in violation of the Act (7 U.S.C. § 213(a)), and a violation of the regulation requiring full disclosure to principals (9 C.F.R. § 201.44).

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[4] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978) *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

However, whether these violations, which were a tiny fraction of respondent's total business, were part of a sinister scheme to make a secret profit from principals, warranting a substantial suspension order, or merely inadvertent and unintentional lapses warranting no more than a cease and desist order, is a question to be determined primarily by the administrative law judge, who had the opportunity to see and hear respondent testify and give his explanation of the transactions. *See, In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Martin*, 40 Agric. Dec. 246, 248-49 (1981); *In re Crowder*, 40 Agric. Dec. 33, 34 (1981); *In re Thornton*, 38 Agric. Dec. 1425, 1426-28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

Judge Baker determined that respondent is a credible witness, and she believed his protestations of innocence. There is no basis for the Judicial Officer on this record to overturn her determination in this respect. Accordingly, only a cease and desist order will be issued.

The use of false and deceptive names in the purchase or sale of livestock, even though not done for a sinister purpose, is a violation of the Act (7 U.S.C. §§ 213(a), 221) and the regulations (9 C.F.R. § 201.44), and is subject to an appropriate order based on the allegations of the complaint. *In re Cody*, 37 Agric. Dec. 410, 414-15 (1978).

Although respondent is no longer engaging in the violations charged in the complaint, it is the practice of this agency to issue a cease and desist order under the Packers and Stockyards Act even when the violator ceases violating or discontinues business. *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 238-39 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Shatkin*, 34 Agric. Dec. 296, 313 (1975).

In view of Judge Baker's acceptance of respondent's explanation of the transactions involved here, there is no basis for finding the corporate respondent unfit for registration.

The complaint issued in this case alleged that respondent violated the Act on numerous specific dates, and, also, at "divers other times." Complainant attempted unsuccessfully to introduce evidence as to other specific violations under the "divers other times" allegation.

Where complainant has evidence that a respondent has engaged in violations similar to those charged in the complaint but does not know the dates of the violations, it is appropriate to include in the complaint

a "divers other times" allegation, and introduce proof in support of that allegation. *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *Farmers' Livestock Commn. Co. v. United States*, 54 F.2d 375, 381 (E.D. Ill. 1931) (3-judge ct.); *In re Mirman Bros., Inc.*, 40 Agric. Dec. 201, 205-06 (1981) (variance between complaint and proof is significant only if respondent is precluded from adequate defense); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976); and *see Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968). But where, as here, complainant knew the dates of the other violations, complainant was required to either include the other dates in the complaint, or else respondent would have been entitled to a delay of the hearing to prepare an appropriate defense.

In the instant proceeding, complainant argued for a much greater range and gravity of violations than those sustained by the ALJ. According to the P&S analysis, gateman Willis was seen as speculating among livestock consignments for his own account, and profit, to the detriment of consignors. Respondent's manager, Graydon Bobo, was seen as willfully engaging his key employee, Willis, in the violations, and allowing fictitious names, rather than Willis' name, on the paperwork, better to conceal the illegal transactions. Designating Willis a "gateman" did not negate Willis' key employee status.

My analysis reveals a somewhat different scenario, which supports the ALJ's decision. Respondent has for decades operated a large livestock market, a very small part of which consists of "odd lot hogs." (Respondent also handles a small number of undesirable cattle and sheep.) "Odd lot" hogs are not "No. 1," or "top" hogs, which are preferred by packing companies, and there were few buyers interested in them. Livestock auction operators perennially have difficulty developing and maintaining a market for odd lot hogs and other undesirable animals. Indeed, some auction markets do not even provide an odd lots sale. Those that do often argue against the suspension sanction in a disciplinary proceeding, because suspension would deprive the small livestock producer of any market at all for his animals (*see, e.g., In re White*, 47 Agric. Dec. 229, 305-06 (1988), *aff'd per curiam*, 865 F.2d 262 (6th Cir. 1988) (unpublished; text in WESTLAW)). Because of my decision herein, we do not reach this issue, but I note that this argument in *White* did not prevent a suspension.

The preponderance of the evidence shows that respondent had had increasing problems in its odd lot endeavors. One buyer, a Mr. O. L. Fortner, had purchased odd lots, for a time, until his account at Wilkes County Stock Yard became delinquent thousands of dollars (Tr. 207-08). Subsequently, the resulting thinness of buyers in odd lots had allowed one buyer, a Mr. Bratcher, to take great advantage price-wise of odd lot consignors (Tr. 67-68, 210). Against this background, Mr. Fortner reappeared representing

C&S Livestock. After Wilkes County Stock Yard would no longer do business with him directly (see Tr. 207), Mr. Fortner asked a key market employee (Willis) to be the go-between for odd lot sales to C&S Livestock, for a commission to be paid to Willis (Tr. 65). Willis approached Bobo and got approval for this marketing scheme (Tr. 68-69).

The evidence is clear that this arrangement is the core activity which P&S has documented. Although P&S has listed some random livestock sales by Willis outside of the C&S Livestock arrangement, I doubt that this case would have been prosecuted based upon those few activities alone. On the other hand, I am confident that the core C&S Livestock activity described above would have brought, and properly so, diligent scrutiny by P&S, whether the other resales occurred, or not. While I do not believe a complete rehash of the evidence, based upon complainant's appeal petition, would be helpful, it would be exemplary of complainant's case for increasing the sanction to look at some of it.

To that end, an examination of complainant's first argument in support of increasing the sanction will be made (Complainant's Appeal Petition and Brief in Support, pp. 6-7 (April 8, 1988) (hereafter "CAP")). Complainant argues that the ALJ erred in not finding that documented transactions, where Willis sold livestock out of consignment, were essentially for speculation. Complainant lists 13 transactions that "show speculation between April 3 and July 10, 1985, in which Mr. Willis purchased calves and sheep out of consignment during respondent's Wednesday sale and, with the expectation of making a profit, principally resold the animals the following Monday, at Farmer's Livestock Market, Leesville, South Carolina, and to individual purchasers for a profit. [CX 5A, p. 1, line 6; CX 5B, p. 5, line 15, p. 6; CX 5C, p. 1, line 15; TR, pp. 45-47] [CX 6, p. 7, line 6, p. 11, line 4; CX 7, p. 1, line 4, pp. 5 and 8; CX 8, p. 2; TR, p. 48] [CX 8A, p. 1, line 17; CX 8B, p. 5, line 10, p. 7; CX 8C, p. 2, line 2 and handwritten note at line 13, p. 3, line 10] [CX 14A, p. 3, lines 1 and 2, p. 5, line 15, p. 7, line 1, p. 9, line 5, p. 11, line 1; CX 14B, p. 1, line 5, pp. 6 and 7; CX 14C, pp. 1 and 2; TR, pp. 49-51] [CX 15, p. 1; CX 16, pp. 4 and 7, line 2; CX 17, p. 1, lines 7-9]" (CAP at 7) (bracketed citations in original).

Of these exhibits, the following are not in evidence: CX 5A, 5B, 5C, 8A, 8B, 8C, 14A, 14B, and 14C.

Thus, complainant has the following exhibits left to support the argument for an increased sanction: CX 6, 7, 8, 15, 16 and 17. Of these, only CX 17 clearly references resale at Farmers Livestock Auction, Inc., at Leesville, South Carolina. Lines 7-9 of that invoice indicate three sheep resold to "C&S Goats" for a total of $78, which is not the magnitude of violation to support a 28-day suspension.

The other transactions do indicate that "WW," Joe Willis' designation, was the buyer out of consignment to Wilkes County Stock Yard, Inc. However, all but one of these exhibits merely indicate that Willis was the buyer, and it is not apparent what Willis later did with the livestock. CX 8, p. 2, together with testimony (Tr. 48), establish that Willis resold two calves to a neighbor, Sam Hutchins, for a $35 profit. Again, a speculative transaction, technically, but clearly not enough activity to support a major suspension sanction.

Taken altogether, I must agree with the ALJ that complainant has not shown by these exhibits the severity and gravity of violations, at least, not of sufficient magnitude, to support a 28-day suspension. My conclusion, therefore, is that complainant is in essentially the same posture as described in *Roberts*, *supra*, where complainant alleges certain conduct in the complaint, but is not able to enter into evidence the specific violations to support the complaint.

The remainder of this part of complainant's appeal (CAP at 7-8) details the arrangement between Willis and C&S Livestock, where Willis received a guaranteed 50¢ per cwt profit (or commission), so long as Willis purchased hogs out of consignment *to fill orders within a stated price range*. Since the ALJ found this to be the case, as well, there is no point in belaboring it (Finding 7).

However, the complainant cites as error the ALJ's determination that this activity is not "speculation"; and contrariwise cites the last paragraph of the *Blackfoot* decision, as follows (CAP at 6):

> Speculation is defined as purchasing livestock from consignment with the expectation or the intention of making a profit on the prompt resale of the animals whether or not a profit is realized. *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590, 610 (1986) [, *aff'd*, 810 F.2d 916 (9th Cir. 1987)].

Well, this statement from page 610 is accurate as far as it goes, but *Blackfoot* guides the analysis with more than that, and the entire page is reproduced, as follows (*Blackfoot, supra*, at 610) (emphasis added):

> IV
>
> Blackfoot Has Wilfully Violated The Act And Regulations By Permitting Dennis Lake And Delwyn Ellis, Its Owners And Officers, To Purchase Livestock Out Of Consignment For Resale For Their Own Speculative Accounts.
>
> A market agency selling livestock on a commission basis has a fiduciary duty to each of its consignors to market his livestock in a manner best designed to enable the consignor to obtain the highest possible price for his livestock. Section 201.58 of the regulations promulgated under the Act requires the market to sell livestock in such a manner as to promote the interest of the consignors. ([9] CFR §201.58)
>
> It is the responsibility of a market agency such as Blackfoot to obtain the true market value of the livestock for its consignors. The market should purchase livestock itself only to assure that the consignor gets the true market value of those livestock. (TR 462) Section 201.57(a) of the regulations in effect at the time of the transactions in question specifically provided that "[n]o market agency engaged in selling consigned livestock at auction shall permit its

owners, officers, agents, or employees to purchase livestock from consignments for resale for their own speculative accounts. . . ." (9 CFR § 201.57(a)).

The regulation is designed to insure that the market agency fulfills its fiduciary duty to further the interests of its consignors. A market which purchases livestock out of consignment for speculative purposes, or permits its owners to do so, has a conflict of interest. If it begins speculating, it erodes its loyalty to the consignor; it is no longer seeking the highest possible dollar for the consignor, but rather acting in its own interest in order to maximize its potential profit on resale. (TR 539)

Whether a particular purchase is a purchase to support the market, and therefore consistent with fulfilling the market's fiduciary responsibility to its consignors, or a purchase for speculative resale depends upon an analysis of all the circumstances surrounding the case. No one single factor is dispositive.

Market support purchases are purchases made by the market when it feels that the highest bid does not reflect the true market value of the livestock. (TR 478)

Speculation out of consignment, on the other hand, is defined as purchasing livestock from consignment with the expectation or the intention of making a profit on the prompt resale of these animals, whether or not a profit is realized. (TR 461)

Based upon the evidence of record, and, upon seeing and hearing the witnesses testify, the ALJ herein found that Willis was buying the hogs to fill C&S's order, rather than for speculative resale, and that Bobo gave Willis permission to buy out of consignment because Bobo "believed it would make a more competitive market of benefit to consignors" (Finding 10). The ALJ, on balance, decided that the essential activity was not speculative in nature.

In applying the admonitions of *Blackfoot, supra*, to this case, where the severity of the sanction is the issue, it is best left to the ALJ to decide from "an analysis of all the circumstances surrounding the case" whether the facts herein are more clearly characteristic of buying to fill an order (which, under the circumstances here, added needed buying power for odd lot hogs) or speculation. And, here is where the *Roberts* decision, *supra*, provides additional guidance, where it states (emphasis added):

However, whether these violations, *which were a tiny fraction of respondent's total business*, were *part of a sinister scheme to make a secret profit from principals*, warranting a substantial suspension order, *or merely inadvertent and unintentional lapses* warranting no more than a cease and desist order, is *a question to be determined primarily by the*

administrative law judge, who had the opportunity to see and hear respondent testify and give his explanation of the transactions.

The violations herein were not part of a sinister scheme to make a secret rofit from principals. However, unlike *Roberts*, the violations were not nintentional or inadvertent. Thus, I hasten to add that my analysis herein is ot meant to, and does not, exonerate or exculpate respondent's violation of llowing its key employee to buy out of consignment to fill orders. The ALJ roperly assessed a civil penalty; and, I here merely decide that the espondent's transgressions occurred in a very minor part of its overall usiness, and do not warrant a major suspension sanction.

The other part of the ALJ's decision appealed as error by complainant is hat the ALJ did not find that respondent allowed, or caused, *fictitious names* o be placed on *accounts of sale to consignors*, in lieu of respondent's mployee Willis' name, as true buyer of livestock bought out of consignment o respondent (ALJ's *Conclusions*, No. 1). This is not to be confused with the ALJ's sustaining of complainant's charge that respondent committed an unfair ractice, through its failure to disclose *Willis' name on accounts of sale urnished consignors*, and respondent's failure to disclose the fact that the true uyer was a key employee of respondent (ALJ's *Conclusions*, No. 3).

While it may seem that this distinction is akin to splitting hairs, I find the ALJ to be correct on this issue, both technically, and from a regulatory ractice standpoint. The accounts of sale furnished consignors did not have "fictitious" names, but, rather, Willis' code name, "WW." Of course, the use of Willis' code name was deceptive to consignors, as the ALJ properly found. The "fictitious" names were put on *buyer's bills* on two occasions, cited by complainant, as "J.A. Wilson and Buddy Martin" in lieu of the buyer's true name, Joe Willis. (CAP at 10-11).

Technically, the regulation on accounts of sale (9 C.F.R. § 201.56(e)) requires that proper, complete disclosure be made on the *account of sale to the consignor*. Thus, the deception is that Joe Willis' name should have been on there, and not the code. The ALJ properly found this a violation, deserving of a civil penalty.

On the other hand, I agree with complainant that respondent did put fictitious names on the two buyer's bills. But there is no allegation in the complaint that respondent showed fictitious names on *buyer's bills*, and after the proof showed that the two bills containing fictitious names were buyer's bills (given to Willis), rather than accounts of sales issued to consignors, complainant did not ask to have the complaint amended to conform to the evidence. Hence this matter cannot be considered in determining the sanction. *In re Bosma*, 41 Agric. Dec. 1742, 1753-54 (1982), *aff'd in part and rev'd in part*, 754 F.2d 804 (9th Cir. 1984).

But even if the fictitious names were relevant under the pleadings, complainant's argument that the false names must have been intended to deceive consignors (CAP at 13) is not supported by the record. The record shows a reason for the use of the fictitious names, apart from an attempt to deceive consignors. The answer comes from the testimony of respondent's manager Bobo, who testified that the fictitious names might have been used

to circumvent the State of Georgia's prompt payment regulations (and possibly the federal prompt payment regulations, as well), as follows (Tr. 214-16) (emphasis added):

BY MR. EFTINK:

Q. Now, Mr. Barthel, I think, was the one that mentioned earlier that he thought you said something about putting the name on the account that's different than the name of the buyer for some reason. Do you recall a conversation such as that?

A. Not indirectly but the conversation could've taken place, yes, sir.

Q. Do you recall what you said?

A. *He may have asked me why was the name on here different than W-W and I would have instructed that we had been advised to put that name on there and it could've -- I could've stated that it could be so that he would not show up as a dealer but would appear as a farmer.*

Q. Now, what would you mean by that statement?

A. *Our accounts -- well, first let me say, the prompt payment rules of Georgia and the federal are very strict.* The cattle that are bought have to be paid for within seventy-two hours or we have to receive payment -- our sale day's on Wednesday -- *we have to receive payment on Wednesday before we can sell that individual any more cattle, except a farmer.* We can -- if it is agreeable with Mr. McGill or myself, we can let a farmer go two weeks or thirty days.

Our accounts receivable for our information only is broken down -- our ledger is broken down between order buyers or packers, individuals that are bonded, and then what we consider our farmers.

Q. Let me stop you right there. Just so that it's clear, do you have two different accounts receivable listings?

A. I have one major control accounts receivable listing in our ledger but . . .

Q. Are you saying that one category is the professional buyers like packers, order buyers and dealers --

A. Right.

Q. -- and then the other one would be farmers?

A. That's correct, yes.

Q. Why do you break them out that way?

A. *Well, it was not required but we set it up to make it easier on us and the Department of Agriculture to audit our records and determine that we were in compliance with the prompt payment act.*

Q. *Under the Georgia regulations or statute on prompt pay, are you supposed to report to the state if a professional buyer is late on payment?*

A. *That is correct, yes, sir.*

Q. Is that one reason you've got different categories?

A. That is correct.

Q. Now, in light of that is it possible that Mr. Willis might have given him that name so that he showed up on the farmer's list?

A. It is possible. But any purchases that were made by W-W or Joe Willis were listed on our accounts receivable as a farmer because *we considered him a farmer. We did not know he was, as you are saying, a dealer until this came up about his other transactions.*

In the "Respondent's Reply to Complainant's Appeal and Cross Appeal" (May 19, 1988) (hereafter "RRCACA"), under the heading "Reply Brief," respondent argues the following points (RRCACA at 21-53): that there was no unfair practice, because the regulations are advisory only, and there was no injury of the sort the Act was designed to prevent; that there was no deceptive practice; that the respondent's actions were not willful; that the ALJ's decision that Willis performed duties comparable to a ringman is in error; and that the sanction is too severe.

I have examined each of these arguments carefully, and find that the ALJ correctly addressed each one. Thus, nothing would be gained by further analysis of each of these arguments, and they are hereby rejected.

On the willfulness issue, respondent makes a long, somewhat circuitous argument that the violations were not willful. While the ALJ properly made no finding or conclusion as to willfulness, I will make a few points to counter respondent's argument.

Since there is no suspension sanction imposed herein, it is well settled that willfulness is not an issue. This comes from the requirements of 5 U.S.C. § 558(c), where it reads in pertinent part, as follows (emphasis added):

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, *suspension*, revocation, or annulment of a license is *lawful only if, before the institution of agency proceedings therefor, the licensee has been given--*

(1) *notice by the agency in writing* of the facts or *conduct which may warrant the action*; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Language from the *Hines* decision also makes this clear, when it states (*In re Hines*, 35 Agric. Dec. 113, 125 (1976)) as follows (emphasis added):

> Respondent Tindel's testimony indicates that he did not understand during the time of the transactions involved herein the exact nature of "dealer" activities (see, *e.g.*, Tr. 87-88), and that he did not know that his arrangement with Mr. Hines was unlawful (Tr. 144, 147-149). [Footnote omitted.] It is of no consequence, however, whether respondent Tindel knew that his activities were in violation of the law. It is sufficient that he was aware of the nature of the transactions, and that such transactions were in fact in violation of law. *Since the only sanction requested is a cease and desist order, rather than a suspension order, it is irrelevant whether or not the violations were "willful," within the meaning of the Administrative Procedure Act (5 U.S.C. 558(c))*. In this respect, however, it is settled that a violation may be wilful within the meaning of the Administrative Procedure Act irrespective of whether the person knows that he is breaking the law (see the cases cited in *In re Henry S. Shatkin*, 34 Agriculture Decisions 296, 298-306 (1975)).

Moreover, even if there were a suspension sanction herein, it would not help respondent on the willfulness issue, because it is well settled under 5 U.S.C. § 558(c) that willfulness does not have to be shown, if respondent had received warning letters prior to the charged violation. Furthermore, the violations do not even have to be found *intentional* to support a finding that the violations were clearly willful. Both these points were recently reaffirmed in the *Hutto* decision, where it is stated, as follows (*In re Hutto Stockyard, Inc.*, 48 Agric. Dec. ____, slip op. at 69 (Apr. 19, 1989), *appeal docketed*, No. 89-2717 (4th Cir. June 5, 1989) (emphasis added)):

> Finally, the ALJ correctly held that *proof of willfulness is not required since warning letters were sent to respondents*. In addition, the *violations here were clearly willful, irrespective of whether they were intentional. Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1972); *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

On the issue of whether Willis was a key employee prohibited by the regulation from buying out of consignment to fill orders, the ALJ correctly held that Willis did not perform all of the duties of a ringman. In *In re Loretz*, 36 Agric. Dec. 1087, 1102-03 (1977), which was decided before "ringmen" were specifically included as one of the key employees prohibited from buying out of consignments, the position is described as follows:

The question of whether a ringman is an employee "performing duties of comparable responsibility [to an auctioneer or weighmaster] in connection with the actual conduct of auction sales by the market agency" has not been decided in a litigated case. It is, however, the longstanding position of the Packers and Stockyards Administration that the duties of a ringman are comparable to those of an auctioneer or weighmaster. This position is reflected in numerous cases resolved on a consent basis. See, *e.g., In re Phoenix Livestock Market*, 32 Agr Dec 459 (1973); *In re Bedford Livestock Market, Inc.*, 32 Agr Dec 426, 428 (1973); *In re Martin-Blomquist & Lee*, 32 Agr Dec 1424 (1973); [footnote omitted] *In re Columbus-Muscogee Livestock*, 31 Agr Dec 63, 65, 72 (1972). The position of the Packers and Stockyards Administration is well-known and accepted in the industry. Respondent testified that "the ringmen definitely know that they are not allowed to buy cattle" (Tr. 231).

Edward Coles, an expert witness for complainant, testified as to the duties and responsibilities of a ringman as follows (Tr. 195-196):

> Q. What are the duties and responsibilities of a ringman, can you go into a little more detail?
>
> A. Yes, a good ringman is a real asset to the selling part of the livestock for the consignors. Usually a good ringman not only knows the buyers, he knows the prospective ranchers and farmers who attend the sale, who want to purchase livestock. Many times the buyers and ranchers and farmers will give a ringman their bid when they don't give them to the auctioneer. A good ringman will receive the bids and pick up bids many times that the auctioneer may miss.
>
> Q. In your opinion are a ringman's responsibilities and duties comparable to those of an auctioneer or weighmaster.
>
> A. Yes. We consider a selling team, a market operator, as in the ring, his auctioneer, his clerk and the ringman should all be working as a team to get the highest dollar for the consignor.

Accordingly, respondent violated the Act when he permitted his ringmen to purchase livestock from consignments either directly or through partners.

Similarly, in *In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546, 1566-67 (1977) (decision by now Chief Judge Palmer), the ringman position is described as follows:

> Section 201.57(a) (9 CFR 201.57(a)) prohibits a market agency from permitting "auctioneers or weighmasters, or other employees

performing duties of comparable responsibility in connection with the actual conduct of auction sales by the market agency, to purchase livestock out of consignments *for any purpose* for their own account" (emphasis added). As is the case with auctioneers, ringmen must be precluded from buying livestock because they can exercise control over and influence the bidding. The auctioneer may close the bidding early for an insider, or he may fail to push bidders higher on an animal he wants himself. A ringman may start bids, may help to spot bids or may help to encourage or discourage bidders. They are both part of a market's selling team, and their loyalty to consignors has to parallel that of the market itself. The purpose of section 201.57(a) is to assure their loyalty and to maintain competitive markets where shippers will receive the highest prices.

Although Willis did not perform all of the duties of the ringmen referred to in *Loretz* and *Smithfield*,[5] Willis was part of the selling team, assisting in the sale of the animals, and standing directly adjacent to the ring. He was obviously in a position more favorably situated than potential bidders required to sit in the stands. Permitting him to fill his orders from that favored position could well drive other potential buyers away from the market. Considering all of the circumstances, the ALJ correctly held that Willis came within the prohibition applicable to key employees (9 C.F.R. § 201.56(d)).[6]

On the issue of severity of the sanction, respondent correctly states that "the JO has increased penalties substantially in recent years . . ." (RRCACA at 46). Respondent then provides a digest of decided cases, and penalties therein, to support the argument that the penalty sought by complainant is too severe. (RRCACA at 47-49). I have given these cited cases and penalties due consideration, and I disagree that the monetary sanction sought by complainant is too severe. In fact, although the ALJ's sanction herein will be increased somewhat, it will still be quite modest compared to other recent cases and given the nature and seriousness of the proven violations. This is explained below.

However, since respondent has provided this list of cases, and has relied on the *Farrow* case (*Farrow v. U.S.D.A.*, 760 F.2d 211 (8th Cir. 1985) throughout this proceeding, I believe it would be helpful to include at this point a restatement of the USDA Sanction Policy, which includes both some of the cases which are relied upon by the Judicial Officer in setting sanctions, and the Judicial Officer's decision (with explanations) that *Farrow* is no longer

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[5]Whether respondent was failing to perform reasonable selling services, in violation of the Act (7 U.S.C. §§ 205, 208), by not having Willis perform all of the customary functions of a ringman is an issue not presented in this case.

[6]Although respondent may not have known that Willis would be regarded as a key employee, prohibited from filling orders from consignments, respondent could easily have telephoned or written the P&S area office in Atlanta, Georgia, as to this matter (particularly after respondent had been warned about prior violations of the regulation relating to purchases by respondent's auctioneers). Furthermore, ignorance of the law does not decrease the sanction. *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 435, 462 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

relevant in view of changes in the Department's sanction policy resulting from the *Farrow* decision. These points were restated in the recent case of *In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. ____, slip op. at 18-22 (Mar. 14, 1989), as follows (emphasis added):

> Respondents argue that a 21-day suspension order is too severe. But it is, in fact, quite modest, considering the serious nature of respondents' violations, and the potential for great harm to result to livestock producers as a result of such violations.
>
> It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), attached as Appendix C to this decision (Appendix C at 198-209, 213-51).[4]

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[4]Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*,

510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in Farrow v. USDA, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and the material relevant to the Farrow decision are set forth in Spencer, 46 Agric. Dec. at 424-31, 455-62; Appendix C at 198-208, 242-51.

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g.*, *In re Ferguson*, 48 Agric. Dec. ____ (Mar. 1, 1989) (6-month suspension and $25,000 civil penalty (held in abeyance) for increasing prices in commission transactions) [, *appeal docketed*, No. 89-2079 (8th Cir. July 7, 1989)]; *In re Great American Veal, Inc.*, 48 Agric. Dec. ____ (Jan. 19, 1989) ($129,000 civil penalty for failing to pay for livestock, operating while insolvent, giving undue preference to a creditor, and taking over another packer's inventory without paying the packer's creditors), *aff'd*, No. 89-3108 (3d Cir. Nov. 27, 1989); *In re Tiemann*, 47 Agric. Dec. ____ (Oct. 20, 1988) (5-year suspension for failure to pay $27,000 for livestock, to be terminated after 180 days if full payment made); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. [1216 (1987)] (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. [791 (1987)] (90-day suspension and $10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) ($50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) ($50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) ($50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of

consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and $10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) ($10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) ($77,000 civil penalty, with $27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) ($20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

Even if respondents were ignorant of the law with respect to their violations, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *See, e.g., In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (which is done for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), but the sanction would be the same irrespective of those circumstances. *See In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

> If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

Additionally, the material from *Spencer, supra*, which contains the *Farrow* case analysis will be attached hereto as an *Appendix*.

A final matter concerns the respondent's cross appeal (RRCACA at 53-56), which argues that the ALJ erred in rejecting certain evidence concerning whether respondent's activities were unfair or deceptive; that the ALJ erred in finding that Willis had many of the attributes of a ringman; and that, if any penalty is appropriate, it should be less than $3,000.

I have examined each of these arguments in light of the evidence of record, and I find that they are without merit, except for the evidentiary argument. I agree with respondent that respondent's offers of proof with respect to the nature and effect of respondent's conduct involving the

purchases by Willis (Tr. 86-88, 165-67) should have been received,[7] and, therefore, the offers of proof will be regarded as evidence in this proceeding, as well as the "legislative history" referred to in my modification of the ALJ's decision. Notwithstanding this evidence, I agree with complainant that serious violations were committed here, irrespective of whether the regulation at issue here is regarded as advisory or legislative in nature.

The issue as to whether P&S regulations are advisory or legislative is analyzed in 1 Davidson, *The Packers and Stockyards Act Regulatory Program*, *supra*, at § 3.16, as follows:

§3.16 Issuance and Effect of Regulations and Policy Statements

Authority to issue regulations under the Packers and Stockyards Act is contained in §402 of the act,[84] which adopts by reference the authority of the Federal Trade Commission (FTC) to issue regulations,[85] and in §407 of the act.[86] For many years, both the FTC and the Packers and Stockyards agency took the position that their

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[84]7 USC §222.

[85]Federal Trade Commission Act, Pub L No 203, §6(g), 38 Stat 721 (1914) (current version at 15 USC §46(g)). The FTC Act was amended in 1975 to require rule making proceedings before the FTC can issue a rule defining with specificity acts or practices which are unfair or deceptive, 15 USC §§46(g), 57a (1976 & Supp III 1979), but that requirement was not in the FTC Act when it was adopted by the Packers and Stockyards Act, and it has generally been held that the adoption of a statute by reference is an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent amendment of the statute adopted. *In re* Heath, 144 US 92, 93-96 (1892); Annot, 2 LEd2d 2048 (1957).

[86]7 USC §228(a). Also, bonding regulations are authorized by 7 USC §204.

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[7]*In re Bosma*, 41 Agric. 1742, 1754-55 (1982), *aff'd in part and rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Thornton*, 38 Agric. Dec. 1425, 1435, 1436 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *Western Iowa Farms Co. v. Sioux City Stock Yards*, 38 Agric. Dec. 209, 209-10 (remand order), *final decision*, 38 Agric. Dec. 1296 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1285, 1312 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1600-01 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re R&D Invs., Inc.*, 35 Agric. Dec. 668, 669-70 (1976); *In re Hygrade Food Prods. Corp.*, 35 Agric. Dec. 129, 131 n. 2 (1976); *In re Lester Murtha*, 21 Agric. Dec. 1213, 1215 (1962).

regulations were merely advisory and did not have the force and effect of law.[87] However, when the FTC changed its position and contended that its regulations have the force and effect of law, its new position was sustained.[88]

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[87]*In re* Central Coast Meats, Inc, 33 Agric Dec 117, 134-36 (1974), *revd on other grounds*, 541 F2d 1325 (9th Cir 1976) (2-1 decision); and *see* Fairbank v Hardin, 429 F2d 264, 269 (9th Cir), *cert denied*, 400 US 943 (1970); United States v Donahue Bros, Inc, 59 F2d 1019, 1021-22 (8th Cir 1932); and §3.22, text accompanying notes 119-121.

[88]National Petroleum Refiners Assn v FTC, 482 F2d 672, 673-98 (DC Cir 1973), *cert denied*, 415 US 951 (1974).

In cases decided under the Packers and Stockyards Act since the change of position as to the force and effect of FTC regulations, the judicial officer has assumed, without deciding or implying any opinion with respect to the matter, that the Packers and Stockyards regulations are merely advisory.[89] In a rulemaking proceeding in 1974, the administrator of the Packers and Stockyards Administration stated that

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[89]*In re Bosma*, 41 Agric Dec 1742, 1754 (1982), *affd in part & revd in part*, 754 F2d 804 (9th Cir 1984); *In re* Jackson Union Stockyards, Inc, 37 Agric Dec 1533, 1540 (1978), *affd mem*, 597 F2d 770 (5th Cir 1979); *In re* Sterling Colo Beef Co, 35 Agric Dec 1599, 1600-02 (1976) (ruling on certified questions), *final decision*, 39 Agric Dec 184 (1980), *appeal dismissed*, No 80-1293 (10th Cir Aug 11, 1980); *In re* R&D Invs, Inc, 35 Agric Dec 668, 674-75 (1976); *In re* Hines, 35 Agric Dec 113, 118 (1976); *In re* Hardy, 33 Agric Dec 1383, 1398 (1974); *In re* Central Coast Meats, Inc, 33 Agric Dec 117, 134-36 (1974), *revd on other grounds*, 541 F2d 1325 (9th Cir 1976) (2-1 decision).

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the rule then being issued "is deemed to be of an advisory nature," but he stated that the act "authorizes the Secretary to issue substantive as well as procedural and advisory regulations necessary to carry out the provisions of the Act."[90] The determination will have to be made on a case by case basis as to whether a particular regulation is advisory or has the force and effect of law.

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[90]39 Fed Reg 17529, 17537 (1974). For an example of a substantive regulation, *see* the cases cited in §3.77, notes 672-674 and related text.

In *United States v. Marshall Durbin & Co*, No CV 84-PT-1920-S (ND Ala Sept 11, 1985), the court recognized that the secretary has the authority to issue legislative rules having the force and effect of law, but held that a poultry weighing regulation (9 CFR §201.82 (1985)) should be regarded as an interpretive rule, since the secretary did not comply with the notice and comment provisions of the Administrative Procedure Act before changing his view that the regulation was legislative, rather than interpretive.

Since (i) the present regulation was issued in 1984, after the decision holding that Federal Trade Commission regulations issued pursuant to the same statutory authority are legislative in nature, and (ii) the regulation was issued after notice-and-comment rulemaking, I believe that the regulation at issue here is legislative in nature. But even if the regulation were regarded as advisory, the evidence here shows that in the long run, consignors will be adversely affected by permitting key employees who are part of the sales team to purchase on order or for speculation.

I am concerned that this decision will have the proper deterrent effect on respondent and any other market agencies who might be considering buying out of consignment in a prohibited manner, but especially in a misguided attempt at market support. The regulations provide a mechanism for such beneficial activity, and I find that the ALJ's civil penalty would not be enough of a deterrent.

Moreover, I am chastened by the fact that respondent had received earlier, written warnings against this type of activity. To be sure, respondent testified that other persons, long since gone from the scene, were responsible for those violations. But, the fact remains that the respondent was completely aware of these written admonitions, and still committed the present similar violations.

For the foregoing reasons, the following order should be issued.

Order

Respondent, its officers, directors, agents and employees, successors and assigns, directly or through any other corporate device, shall cease and desist from:

1. Permitting its ringman or any other employees engaged in the actual conduct of auction sales to purchase livestock out of consignment to fill orders or for speculative resale;

2. Issuing accounts of sale which fail to show the true and correct names and relationship to respondent of any employee purchasing consigned livestock;

3. Charging, demanding or collecting a greater, less or different compensation for stockyard services furnished by it as a posted stockyard than the rates and charges filed with the Secretary of Agriculture and in effect at the time such services are furnished.

Respondent Wilkes County Stock Yard, Inc., is assessed a civil penalty in the amount of $5,000.

The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Room 2446, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondent.

The cease and desist provisions of this order shall become effective on the day after service of this order.

APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.--Editor.]

PACKERS AND STOCKYARDS ADMINISTRATION

MISCELLANEOUS ORDERS

In re: KENNETH L. MATTISON.
P&S Docket No. 3309.
Supplemental Order filed July 28, 1989.

Jory M. Hochberg, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

On July 6, 1964, an order was issued in the above-captioned matter which, *inter alia* suspended respondent as a registrant under the Act until such time as solvency is demonstrated.

Respondent has demonstrated that he is now solvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued July 6, 1964, is terminated. The order shall remain in full force and effect in all other respects.

Copies of this order shall be served upon the parties.

In re: FINGER LAKE LIVESTOCK EXCHANGE, INC., RONALD E. PARKER and BARBARA PARKER.
P&S Docket No. 6793.
Supplemental Order filed July 31, 1989.

Peter V. Train, for Complainant.
Daniel W. Olsen, for Respondents.
Supplemental Order issued by Donald A. Campbell, Judicial Officer.

On March 14, 1989, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent Finger Lake Livestock Exchange, Inc., and Ronald E. and Barbara Parker, as its *alter egos*, as registrants under the Act for period of 21 days and thereafter until such time as Finger Lakes Livestock Exchange, Inc., demonstrates that the shortage in its custodial account has been corrected and that its current liabilities no longer exceed its current assets.

Respondent Finger Lakes has now demonstrated that the shortage in its custodial account has been corrected and that its current liabilities no longer exceed its current assets. The 21-day period of definite suspension will end July 27, 1989. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 14, 1989, is terminated, effective July 28, 1989. The order shall remain in full force and effect in all other respects.

In re: ALVIN BRAUN.
P&S Docket No. D-88-37.
Supplemental Order filed August 3, 1989.

Roberta Swartzendruber, for Complainant.
Ernest H. Van Hooser, for Respondent.
Supplemental Order issued by James W. Hunt, Administrative Law Judge.

On May 18, 1989, an order was issued in the above-captioned matter, which, *inter alia*, suspended as a registrant under the Act for period of sixty days and thereafter until such time as he demonstrates that the shortage in his custodial account has been corrected and that his current liabilities no longer exceed his current assets. Such order further provided that it could be modified to permit the salaried employment of respondent after the expiration of 60 days. The 60-day period of definite suspension has elapsed.

Respondent Alvin Braun is now a salaried employee of Belton Cattle Acution Co., Inc., Belton, Texas. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 18, 1989, is modified to permit the salaried employment of respondent Alvin Bran by Belton Cattle Auction Co., Inc. The order shall remain in full force and effect in all other respects.

In re: CAMERON LIVESTOCK AUCTION, INC. and ALVIN BRAUN.
P&S Docket No. D-89-33.
Supplemental Order with Respect to Alvin Braun filed August 3, 1989.

Roberta Swartzendruber, for Complainant.
Will Adams, for Respondents.
Supplemental Order issued by James W. Hunt, Administrative Law Judge.

On May 18, 1989, an order was issued in the above-captioned matter, which *inter alia*, suspended respondent Cameron Livestock Auction, Inc., and Alvin Braun, as its *alter ego*, as registrants under the Act for a period of five years and thereafter until such time as Cameron Livestock Auction, Inc., demonstrates that the shortage in its custodial account has been corrected and that its current liabilities no longer exceed its current assets. Such order further provided that it could be modified to permit the salaried employment of respondent Alvin Braun after the expiration of 60 days. The 60-day period of definite suspension has elapsed.

Respondent Alvin Braun is now a salaried employee of Belton Cattle Auction Co., Inc., Belton, Texas. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 18, 1989, is modified to permit the salaried employment to respondent Alvin Braun by Belton Cattle Auction Co., Inc. The order shall remain in full force and effect in all other respects.

In re: JOHNNY SLOVER, d/b/a T & J FARMS.
P&S Docket No. 6890.
Supplemental Order filed August 31, 1989.

Roberta Swartzendruber, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

On August 11, 1987, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of five years. Such order further provided that it could be modified to permit the salaried employment of respondent after the expiration of 150 days. The 150-day period of definite suspension has elapsed.

Respondent Johnny Slover is now a salaried employee of Kent Holman Cattle, Inc., Jacksonville, Texas. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued August 11, 1987, is modified to permit the salaried employment of respondent Johnny Slover by Kent Holman Cattle, Inc. The order shall remain in full force and effect in all other respects.

In re: DAVIS LIVESTOCK COMM'N, INC. and BILLY JOE DAVIS, and JOHNNY SLOVER and BILLY JOE DAVIS, d/b/a DAVIS CATTLE CO.
P&S Docket No. 6908.
Supplemental Order filed August 31, 1989.

Roberta Swartzendruber, for Complainant.
Glenn Phillips, for Respondent 1.
Respondent 2, Pro se.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

On February 23, 1988, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent Johnny Slover as a registrant under the Act for a period of five years. Such order further provided that it could be modified to permit the salaried employment of respondent after the expiration of one year. The one year period of definite suspension has elapsed.

Respondent Johnny Slover is now a salaried employee of Kent Holman Cattle, Inc., Jacksonville, Texas. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 23, 1988, is modified to permit the salaried employment of respondent Johnny Slover by Kent Holman Cattle, Inc. The order shall remain in full force and effect in all other respects.

In re: PINE RIDGE FARMS, INC., et al.
P&S Docket No. D-88-81.
Order Dismissing Civil Penalty Assessed Against David Farrington filed September 1, 1989.

Peter V. Train, for Complainant.
Respondents, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

It appearing that respondent David Farrington has made restitution in accordance with the order entered May 15, 1989, it is , therefore, ORDERED that the civil penalty assessed therein is dismissed.

In re: ROBERT M. CAMPBELL and PHILIP A. CAMPBELL.
P&S Docket No. 89-102.
Dismissal filed September 22, 1989.

Jane McCavitt, for Complainant.
Respondents, Pro se.
Dismissal issued by Victor W. Palmer, Chief, Administrative Law Judge.

FOR GOOD CAUSE and on the motion of complainant, this case is dismissed.

In re: LEONARD WADE YAGER.
P&S Docket No. D-88-91.
Order Modifying Consent Decision filed October 12, 1989.

Ben E. Bruner, for Complainant.
Respondent, Pro se.

In re: WESLEY G. WHITEHEAD.
P&S Docket No. 5730.
Supplemental Order filed October 19, 1989.

Peter V. Train, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

On August 5, 1980, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations and demonstrated solvency.

Respondent is now in full compliance with such bonding requirements and has demonstrated solvency. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued August 5, 1980, is terminated. The order shall remain in full force and effect in all other respects.

In re: DONALD HAGEMAN, an individual, S & H HOGS, INC., and S & H FEEDERS, INC., corporations.
P&S Docket No. 5938.
Supplemental Order filed November 21, 1989.

Peter V. Train, for Complainant.
Respondents, Pro se.
Supplemental Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

On March 29, 1983, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent Donald Hageman for a period of 90 days and thereafter until he complies fully with the bonding requirements of the Act and regulations, and until he demonstrates that he is no longer insolvent.

Respondent Hageman is now in full compliance with such bonding requirements and has demonstrated solvency. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 29, 1983, is terminated. The order shall remain in full force and effect in all other respects.

In re: BARNEY GIBSON.
P&S Docket No. 5975.
Supplemental Order filed November 21, 1989.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

On October 12, 1982, an order was issued in the above-captioned matter, which, inter alia, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 12, 1982, is terminated. The order shall remain in full force and effect in all other respects.

In re: MILLER LIVESTOCK MARKETS, INC. and JAMES J. MILLER.
P&S Docket No. D-89-62.
Supplemental Order filed December 22, 1989.

Ben E. Bruner, for Complainant.
Daniel W. Olsen and Maurice L. Tynes, for Respondents.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

On December 7, 1989, an order was issued in the above-captioned matter, which, inter alia, suspended respondents as registrants under the Act for a period of 28 days and thereafter until such time as the shortage in their Custodial Account for Shippers' Proceeds is corrected. Such suspension became effective December 5, 1989.

Respondents have now demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been corrected. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 7, 1989, is terminated, effective January 2, 1990. The order shall remain in full force and effect in all other respects.

PACKERS AND STOCKYARDS ADMINISTRATION

DEFAULT DECISIONS

In re: SUMMIT TRADING CO., INC. FINEWEST CORP., DONALD S. ASHER, and RICHARD D. SHIPPEE.
P&S Docket No. D-89-6.
Decision and Order with Respect to Respondents Summit Trading Co., Inc., FineWest Corp. and Donald S. Asher filed May 26, 1989.

Failure to file answer - Failure to pay when due.

Peter V. Train, for Complainant.
Peter S. Fishman, for Respondents.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents Summit Trading Co., Inc., FineWest Corporation and Donald S. Asher have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Summit Trading Co., Inc., hereinafter referred to as respondent Summit, is a corporation whose business mailing address is 2100 E. 49th Street, Los Angeles, California 90058.

(b) Respondent Summit was, at all times material herein:

(1) Engaged in the business of manufacturing or preparing meat and meat food products for sale or shipment in commerce;

(2) A packer within the meaning of and subject to the provisions of the Act; and

(3) A holding company owning 85 percent of the corporate stock issued by FineWest Corporation doing business as Puritan Meat Company.

(c) FineWest Corporation, hereinafter referred to as respondent Puritan, is a corporation doing business as Puritan Meat Company whose business mailing address is 3026 E. Vernon Avenue, P.O. Box 58123, Los Angeles, California 90058.

(d) Respondent Puritan is, and at all times material herein was:

(1) Engaged in the business of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(e) Donald S. Asher, hereinafter referred to as respondent Asher, is an individual whose business mailing address is 2100 E. 49th Street, Los Angeles, California 90058.

(f) Respondent Asher is, and at all times material herein was:

(1) President of respondent Summit;

(2) Secretary of respondent Puritan;

(3) Principal stockholder of respondent Summit;

(4) Responsible, with Richard Shippee, for the direction, management and control of respondents Summit and Puritan; and

(5) A packer within the meaning of and subject to the provisions of the Act.

2. (a) Respondents Summit and Puritan, under the direction, management and control of respondents Asher and Shippee, in connection with their operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing and on numerous other occasions, purchased meat and failed to pay, when due, the full purchase price of such meat.

(b) As of October 15, 1988, there remained unpaid $379,761.77 for the purchases listed above and for 84 other purchases not detailed in the Complaint and Notice of Hearing.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondents Summit Trading Co., Inc., FineWest Corporation and Donald S. Asher have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

Order

Respondent Summit Trading Co., Inc., its subsidiaries and successors, officers, directors, agents and employees, respondent FineWest Corporation, its successors, officers, directors, agents and employees, and respondent Donald S. Asher, the *alter ego* of the above corporations, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price for meat; and

2. Failing to pay for meat.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Donald S. Asher is assessed a civil penalty of Five Thousand Dollars ($5,000.00).

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final July 28, 1989.-Editor]

In re: MONTE HOOK.
P&S Docket No. D-89-1.
Decision and Order filed May 30, 1989.

Failure to file answer - Acting as market agency without maintaining adequate bond - Failure to pay when due - NSF checks.

Sharlene W. Lassiter, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by regular mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Monte Hook, doing business as Monte Hook Livestock, hereinafter referred to as the respondent, is an individual whose mailing address is 1409 N.W., Carroll, Iowa 51401.

(b) The respondent is, and at all times material herein was, engaged in the business of a market agency buying livestock in commerce on a commission basis.

(c) The respondent has never been registered with the Secretary of Agriculture in any capacity subject to the Act.

2. Commencing on or about September 24, 1987, and continuing until at least March 6, 1988, respondent engaged in the business of a market agency, buying livestock in commerce on a commission basis, without maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

3. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, in connection with his operations as a market agency subject to the Act, on or about the dates and in the transactions set forth in paragraph III(a) and (b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of May 16, 1988, there remained unpaid a total of at least $38,700.00 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated sections 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent Monte Hook, his agents and employees, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent Monte Hook shall not be registered to engage in business as a market agency or dealer subject to the Packers and Stockyards Act for a period of five (5) years, and pursuant to section 303 of the Act (7 U.S.C. § 203) is prohibited from engaging in business subject to the Act without being registered, and until he complies fully with the bonding requirements of the Act and the regulations, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this prohibition at any time after the expiration of 120 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full and that he is in full compliance with such bonding requirements, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of 120 days.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final August 22, 1989.-Editor]

In re: LARRY BROOCKE.
P&S Docket No. D-89-39.
Decision and Order filed July 20, 1989.

Failure to file answer - Operating as market agency without sufficient bond.

Edward M. Silverstein, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Larry Broocke, hereinafter referred to as the respondent, is an individual whose business mailing address is Rt. #1, Box 231, Jonesburg, Missouri 63351.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail that the $10,000.00 surety bond he maintained to secure the performance of his livestock obligations

under the Act would terminate on October 23, 1988, and that it was necessary to secure adequate bond coverage or its equivalent before continuing his livestock operations subject to the Act. Respondent was further notified, by certified letter received November 3, 1988, that he was required to file a bond or its equivalent in the amount of $50,000.00. Notwithstanding such notice, respondent has continued to engage in the business of a dealer and market agency without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated sections 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Larry Broocke, directly or through any corporate or other device, his successors and assigns, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final August 30, 1989.-Editor]

In re: LARRY BROOCKE.
P&S Docket No. D-89-39.
Supplemental Order filed August 15, 1989.

Edward M. Silverstein, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Edwin S. Bernstein, Administrative Law Judge.

On July 20, 1989, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until he demonstrates that he is in full compliance with the bonding requirements under the Act and the regulations.

Complainant has learned that respondent is now employed as a packer buyer for McGee Packing Company, Mexico, Missouri. Accordingly,

IT IS HEREBY ORDERED that the suspension provision the order issued July 20, 1989, is modified to permit the salaried employment of respondent by McGee Packing Company, Mexico, Missouri. The order shall remain in full force and effect in all other respects.

In re: DANIEL E. VAN LITH.
P&S Docket No. D-89-42.
Decision and Order filed July 19, 1989.

Failure to file answer - Failure to pay when due - Failure to maintain accounts and records.

Roberta Swartzendruber, for Complainant.
Respondent, Pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Daniel E. Van Lith, hereinafter referred to as the respondent, is an individual whose principal place of business is located at Clarkston, Washington, and whose business mailing address is 2612 Laurel Drive, Clarkston, Washington 99403.

(b) The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. On or about the dates and in the transactions specified in paragraph II of the complaint, respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock.

3. Respondent, in connection with his business subject to the Act, failed to keep and maintain accounts, records and memoranda which fully and correctly disclosed all transactions involved in his business, in that respondent failed to keep and/or maintain all sales invoices and all purchase invoices, and records permitting tracing of dealer livestock from purchase to sale.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

Order

Daniel E. Van Lith, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Act, including all sales invoices and all purchase invoices, and records permitting tracing of dealer livestock from purchase to sale.

Respondent is suspended as a registrant under the Act for a period of 28 days.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final September 4, 1989.-Editor]

In re: KEVEE RAMSEY.
P&S Docket No. D-89-27.
Decision and Order filed March 15, 1989.

Failure to file answer - NSF checks - Failure to pay when due.

John J. Casey, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Kevee Ramsey, an individual, at all times material herein had a place of business at Route 1, box 65B, Merkel, Texas 79536, and was engaged in the business of buying and selling for his own account as a dealer livestock in commerce.

2. Respondent, in connection with his business as a dealer, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased or sold livestock in reasonable bond or equivalent as required by the Act and the regulations thereunder.

3. Respondent, in connection with his business as a dealer, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased livestock for which in purported payment he issued checks which were returned unpaid by the bank on which they were drawn because respondent did not have sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented.

4. On or about the dates and in the transactions set forth in paragraph III of the complaint, and on or about the dates and in the transactions set forth in paragraph IV of the complaint, respondent purchased livestock and failed to pay the full purchase price of such livestock.

5. On or about the dates and in the transactions set forth in paragraphs III and IV of the complaint, respondent purchased livestock and failed to pay were due the full purchase price of such livestock.

6. As of July 11, 1988, there remained unpaid by the respondent a total of a least $88,000.00 for the livestock purchases referred to in paragraphs III, IV and V of the complaint.

Conclusions

By reason of the facts found in Findings of Fact 2 through 6 herein, respondent has wilfully violated sections 307(a), 312(a), and 409 of the Act, 7 U.S.C. §§ 208(a), 213(a), and 228b.

Order

Respondent, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act as amended and supplemented, and the regulations thereunder, without filing and maintaining a reasonable bond or equivalent as required by the Act and the regulations.

2. Purchasing livestock and in purported payment therefor issuing a check without having sufficient funds on deposit and available in the account on which such check is drawn to pay such check when presented.

3. Purchasing livestock and failing to pay the full purchase price of such livestock.

4. Purchasing livestock and failing to pay when due the full purchase price of such livestock.

Respondent shall not be registered to engage in business as a dealer or market agency subject to the Packers and Stockyards Act for a period of five (5) years, and pursuant to Section 303 of the Act, 7 U.S.C. § 203, he is

prohibited from engaging in business subject to the Act for a period of five (5) years, *provided*, however, that upon application to the Packers and Stockyards Administration a supplemental order may be issued permitting respondent to be registered at any time after the expiration of 180 days upon demonstration by respondent that all unpaid sellers have been paid in full, and *provided further* that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent to be employed on salary by another registrant after the expiration of the 180 days.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final September 10, 1989.-Editor]

In re: CHANDLER HUGHES.
P&S Docket No. D-89-71.
Decision and Order filed August 21, 1989.

Failure to file answer - Failure to pay when due.

Roberta Swartzendruber, for Complainant.
Respondent, Pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Chandler Hughes, hereinafter referred to as the respondent, is an individual whose principal place of business is located at Halifax, Virginia, and whose business mailing address is Route 2, Box 477, Halifax, Virginia 24558.

(b) The respondent, at all times material herein, was:

(1) Engaged in the business of buying livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

3. (a) Respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of May 9, 1989, there remained unpaid a total of $29,824.84 for such livestock purchases.

Conclusions

By reason of the facts found in Findings of Fact Nos. 2 and 3 herein, the respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

Order

Respondent Chandler Hughes, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock, and

2. Failing to pay the full purchase price of livestock.

Respondent Chandler Hughes is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried

employment by another registrant after the expiration of the 120-day period of suspension.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final October 5, 1989.-Editor]

In re: WILMER CARLSON.
P&S Docket No. D-89-56.
Decision and Order filed September 19, 1989.

Failure to file answer - Operating as market agent without sufficient bond.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified

Respondent was informed in a letter of service that an answer should

pursuant to the admission of all the material allegations contained in

int

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

(3) Respondent was notified by the Packers and Stockyards Administration by certified mail on May 25, 1983, that the $10,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act would terminate on June 21, 1983, and that it was necessary to obtain adequate bond coverage or its equivalent before continuing his livestock operations subject to the Act. Respondent was again notified of the bonding requirements under the Act by a hand-delivered letter on January 30, 1989. Notwithstanding such notices, respondent has continued to engage in the business of a market agency without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in paragraph II of the complaint, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

Order

Respondent Wilmer Carlson, his agents and employees, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 28, 1989.-Editor]

In re: HUGH T. HENNESSEY.
P&S Docket No. D-89-24.
Decision and Order filed September 29, 1989.

Failure to file answer - Operating as market agent without sufficient bond.

Ben Bruner, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), ("the Act"), instituted by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that Respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 202.1 *et seq.*).

On August 4, 1989, Complainant filed a Motion for Adoption of Proposed Decision. The motion stated that Respondent failed to file a timely Answer and that Respondent was then in compliance with the bonding requirement of the Act. The motion requested the assessment of a civil penalty of $1,000.00 because Respondent had previously maintained an insufficient surety bond. In a letter filed on September 11, 1989, Respondent stated that he thought that the matter had been resolved because he was then in compliance.

In a September 27, 1989, telephone conference with Ben E. Bruner, Esq., counsel for Complainant and Respondent, Mr. Hennessey acknowledged:

1. That he received copies of the Complaint on December 16 and December 20, 1988, but failed to file an Answer to the Complaint.

2. That at the time the Complaint was issued, he had a $15,000.00 surety bond as the Complaint alleged but he has since increased the bond to the required amount of $35,000.00.

3. That he received a copy of the Motion for Adoption of Proposed Decision on August 18, 1989.

[illegible] stated in the telephone conference, Respondent has violated the Act [illegible] failed to have a surety bond in the required amount; Respondent [illegible] a timely Answer; Respondent has failed to file a timely [illegible]tion; and I find that the assessment of a civil penalty of [illegible]ndent is an appropriate sanction for the violation. [illegible]e following findings of fact, conclusions of law and

Findings of Fact

1. (a) Respondent Hugh T. Hennessey, doing business as Hennessey Cattle Company, is an individual whose business mailing address is P. O. Box 17626, Portland, Oregon 97217.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

3. Respondent was notified by certified mail received August 26, 1988, that the $15,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase his bond to $35,000.00 before continuing his livestock operations subject to the Act. Notwithstanding such notice, Respondent has continued to engage in the business of a market agency without maintaining an adequate bond or its equivalent, until after the Complaint was filed when Respondent increased his bond to the required $35,000.00 amount.

Conclusions of Law

Respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 210.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

Order

Respondent Hugh T. Hennessey, directly or through any corporate or other device, his successors and assigns, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Since Respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is assessed a civil penalty in the amount of $1,000.00.

This Decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final November 15, 1989.-Editor]

In re: WARREN L. WALK, JR.
P&S Docket No. D-89-85.
Decision and Order filed September 14, 1989.

Failure to file answer - Operating as market agent without sufficient bond.

Allan R. Kahan, for Complainant.
Respondent, Pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 202.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Warren L. Walk, Jr., hereinafter referred to as the respondent, is an individual whose business mailing address is R.D. #3, Box 28, Tyrone, Pennsylvania 16686.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

operations subject to the Act. Notwithstanding such notice, respondent has continued to engage in the business of a dealer without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

Order

Warren L. Walk, Jr., directly or through any corporate or other device, his successors and assigns, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he is in full compliance with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 22, 1989.-Editor]

In re: WARREN L. WALK, JR.
P&S Docket No. D-89-85.
Supplemental Order filed October 24, 1989.

Allan R. Kahan, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

On September 14, 1989, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirer
Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the issued September 14, 1989, is terminated. The order shall remain in full and effect in all other respects.

In re: DALE HALEY and RUSHVILLE HORSE SALE CO., INC.
P&S Docket No. D-89-68.
Decision and Order filed October 24, 1989.

Failure to file answer - Operating as market agent without sufficient bond - Failure to ma custodial account - Alter ego - Markup on livestock while serving on commission basis

Edward M. Silverstein, for Complainant.
Ronald L. Wilson, for Respondents.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein ref to as the Act, instituted by a complaint filed by the Administrator, Pa and Stockyards Administration, United States Department of Agricu charging that the respondents wilfully violated the Act and the regula promulgated thereunder (9 C.F.R. § 202.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.1 *seq.*) governing proceedings under the Act were served upon responden regular mail. Respondents were informed in a letter of service that an an should be filed pursuant to the Rules of Practice and that failure to an would constitute an admission of all the material allegations contained i complaint.

Respondents have failed to file an answer within the time prescribed i Rules of Practice, and the material facts alleged in the complaint, whic admitted by respondents' failure to file an answer, are adopted and set herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.1 the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Rushville Horse Sale Company, is a partnership consisting of Haley and Dennis Crowley whose business mailing address is P.O. Box Rushville, Indiana 46173;

(b) The Rushville Horse Sale Company is,and at all material times

(3) Registered with the Secretary of Agriculture as a market agency selling livestock on commission.

(c) On or about February 11, 1987, Rushville Horse Sale Company incorporated its business as Rushville Horse Sale Co., Inc., hereinafter referred to as the "corporate respondent," in the State of Indiana, and continued to do business, maintaining the same business mailing address of P.O. Box 115, Rushville, Indiana 46173, without notifying the Secretary of Agriculture of the change in its registration status until January 23, 1989, when it was registered as a market agency to sell livestock on commission, and posted the proper bond or its equivalent.

(d) Dale Haley, hereinafter "Haley," is an individual whose business mailing address is P.O. Box 115, Rushville, Indiana 46173;

(e) Haley is, and at all material times was:

(1) A partner in the Rushville Horse Sale Company, which was registered with the Secretary of Agriculture as a market agency selling livestock, in commerce, on a commission basis;

(2) Vice-president and 50 percent owner of the corporate respondent;

(3) Responsible for the direction, management and control of the corporate respondent;

(4) Engaged in the business of buying livestock in commerce on a commission basis; and

(5) Not registered, as an individual, with the Secretary of Agriculture.

2. Haley was notified by certified mail, received by him on September 13, 1988, that he was required to register with the Secretary of Agriculture and furnish an adequate bond or its equivalent before continuing his livestock operations subject to the Act. Notwithstanding such notice, Haley has continued to engage in the business of a market agency buying livestock on commission without registering with the Secretary of Agriculture and without maintaining an adequate bond or its equivalent.

3. On or about the dates set forth in paragraph III of the complaint, and in the transactions specified in paragraph III of the complaint, Haley purchased livestock on a commission basis and billed his principal, Cavel International, at prices which were higher t
the subject livestock

5. The corporate respondent, under the direction, management and control of respondent Haley, during the period April 29, 1988, through May 31, 1988, failed to maintain and properly use its "Custodial Account for Shippers Proceeds ("custodial account"), thereby endangering the faithful and prompt accounting therefor and payments of the portions thereof due the owners or consignors of livestock, in that:

(a) As of April 29, 1988, the corporate respondent had outstanding checks drawn on the custodial account in the amount of $57,162.04 and had, to offset those checks, cash in the custodial account of $12,553.90, deposits in transit of $16,541.25, and no current receivables, resulting in a deficiency of $28,066.89 in funds to pay shippers their proceeds; and

(b) As of May 31, 1988, the corporate respondent had a bank overdraft and outstanding checks drawn on the custodial account in the amount of $77,179.62 and had, to offset the overdraft and those checks, current proceeds receivables of $586.85, deposits in transit of $58,085.75, and no current receivables, resulting in a deficiency of $18,507.02 in funds to pay shippers their proceeds.

6. The corporate respondent, under the direction, management and control of respondent Haley, failed to keep and maintain accounts, records, and memoranda which fully and correctly disclose all transactions involved in its business subject to the Act in that it: (1) failed to maintain records which disclose what buyer's amounts make up the initial sale day deposit; and (2) failed to maintain an Accounts Receivable ledger or Custodial Reconciliations which contain the check numbers of outstanding checks.

Conclusions

By reason of the facts found in Finding of Fact 1 herein, respondent Haley is the *alter ego* of the corporate respondent.

By reason of the facts found in Finding of Fact 2 herein, respondent Haley has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 210.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent Haley has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.44 of the regulations (9 C.F.R § 201.44).

By reason of the facts found in Finding of Fact 4 herein, respondent Haley has violated section 401 of the Act (7 U.S.C. § 221)

Order

Respondent Haley, directly or through any corporate or other device, his successors and assigns, in connection with his business as a dealer or market agency buying livestock on commission, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Misrepresenting to his principal the cost of livestock purchased on a commission basis; and

3. Charging or collecting from his principals on the basis of falsely increased prices.

The corporate respondent, directly or through any corporate or other device, its successors and assigns, and respondent Haley, individually or through any corporate or other device in connection with their business as a stockyard and market agency selling livestock on commission shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for a purpose other than the payment of net proceeds to the owners or consignors of such livestock, or for the payment of sums due the corporate respondent as compensation for services rendered or for other lawful marketing charges;

3. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock; and

4. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds," in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42).

Respondent Haley shall keep and maintain accounts, records, and memoranda which fully and correctly disclose the true nature of all transaction involved in his business as a dealer or market agency buying livestock on

commission subject to the Packers and Stockyards Act, including load worksheets, purchase invoices, and sales invoices.

The corporate respondent and respondent Haley shall keep and maintain accounts, records, and memoranda which fully and truly disclose the true nature of all transactions involved in their business as a stockyard and market agency selling livestock on commission subject to the Packers and Stockyards Act, including records which disclose what buyer's amounts make up the initial sale day deposit, an Accounts Receivable ledger, and Custodial Reconciliations which contain the check numbers of outstanding checks.

The corporate respondent and respondent Haley are suspended as a registrant to sell livestock on commission for 28 days and thereafter until the corporate respondent demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated. When the corporate respondent demonstrates that the deficit in its custodial account has been eliminated, a supplemental order will be issued terminating the suspension after the expiration of the 28-day period of suspension.

Respondent Haley shall not be registered to engage in business as a dealer or as a market agency for a period of sic (6) months, and is prohibited, pursuant to section 303 of the Act (7 U.S.C. § 203), from engaging in business as a dealer or market agency subject to the Act without being registered. Respondent Haley is further prohibited, pursuant to section 201.81 of the regulations (9 C.F.R. § 201.81), from being employed by the corporate respondent or any other stockyard owner, market agency, dealer or packer during the six month period of prohibition.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 1, 1989.-Editor]

In re: DALE HALEY and RUSHVILLE HORSE SALE CO., INC.
P&S Docket No. D-89-68.
Order Denying Late Appeal filed December 6, 1989.

Edward M. Silverstein, for Complainant.
Ronald L. Wilson, for Respondents.
Order issued by Donald A. Campbell, Judicial Officer.

Respondents' appeal, dated November 29, 1989, was received and filed by the Hearing Clerk on December 4, 1989, which is after the initial decision had become final and effective. Accordingly, respondents' appeal must be dismissed because it was not timely filed. See *In re Hamilton*, 45 Agric. Dec. 2395 (1986); *In re Rushelle Cattle Co.* 45 Agric. Dec. 1131 (1986); *In re* [illegible] (1985), *appeal dismissed*, No. 85-1220 (10th Cir. [illegible] Agric. Dec. 1220 (1985), the latter of which

For the foregoing reasons, the following order should be issued in this proceeding.

Order

Respondents' appeal is denied since it was not timely filed.

APPENDIX

In re Powell, 45 Agric. Dec. 1220 (1985).

In re: ZINA ANGELL.
P&S Docket No. D-89-51.
Decision and Order filed November 2, 1989.

Failure to file answer - Operating as market agent without sufficient bond - NSF checks - Failure to pay when due.

Peter V. Train, for Complainant.
Respondent, Pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 202.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were personally served upon respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Zina Angell, hereinafter referred to as the respondent, is an individual whose mailing address is Box 383, Hinton, West Virginia 25951.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account, and in the business of buying livestock in commerce on a commission basis; and

(2) A dealer and market agency within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

2. Respondent was notified by certified mail received July 25, 1988, that he was required to register with the Secretary of Agriculture and furnish a bond to secure the performance of his livestock operations subject to the Act. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond protection, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to engage in the business of a dealer and market agency without maintaining an adequate bond or its equivalent.

3. (a) The respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, issued checks in purported payment for livestock purchases which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) The respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III(b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of December 28, 1988, there remained unpaid at least $101,665.40 for the livestock purchases referred to in paragraphs III(a) and (b) of the complaint.

Conclusions

By reasons of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 2011.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, the respondent has wilfully violated sections 312(a) and 409(a) of the Act (7 U.S.C. §§ 213(a), 228b(a)).

Order

Respondent Zina Angell, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and

supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

2. Issuing checks in payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks ar drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay for livestock purchases.

Respondent is prohibited from operating as a market agency or dealer subject to the Act for a period of five years, provided, however, that a supplemental order will be issued after expiration of 150 days upon receipt of an application for registration and furnishing of adequate bond and demonstration that restitution has been made in full; and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of respondent by another registrant or packer after the expiration of the 150-day period.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 14, 1989.-Editor]

CONSENT DECISIONS

(Not published herein.-Editor)

PACKERS AND STOCKYARDS ADMINISTRATION

Delane Mann and Ronald Mann. P&S Docket No. D-89-70. 7/5/89.

Cordele Livestock Co., Inc., and Roger Blanchard, an individual. P&S Docket No. D-88-48. 7/6/89.

Meat House, Inc., and Elias Moraitis. P&S Docket No. D-89-55. 7/11/89.

Wayne E. Rice and Frank Collura. P&S Docket No. D-89-37. 7/20/89.

Utica Packing Co. and David Fenster. P&S Docket No. D-88-68. 7/28/89.

Eastern Kansas Livestock, Inc. and Robert Walrod, Charles J. Borovicka, Dale Koopman, Lucern Smith, James Keen, and Robert Stewart. P&S Docket Nos. D-89-35 and D-89-64. 8/3/89.

Scott Alan Sanders. P&S Docket No. D-89-78. 8/7/89.

Loomis Livestock, Inc. P&S Docket No. D-89-73. 8/14/89.

Albia Sales Co., Inc. and John Peterson. P&S Docket No. D-89-89. 8/14/89.

Pennsylvania Farmers Market, Inc. and Mario Triolo. P&S Docket No. D-89-83. 8/17/89.

Joyce C. Ryles and Jim C. Ryles. P&S Docket No. 6817. 8/18/89.

F. Douglas Wilson, Joann Wilson, J&S Farm, Inc., Billy F. Sloan, and Wayne County Livestock Market, Inc. P&S Docket No. 6903. 8/23/89.

J. O. Cattle Co., Inc. P&S Docket No. D-88-90. 8/28/89.

Robert Brigham, d/b/a Wahoo Livestock Market. P&S Docket No. D-89-81. 8/28/89.

Alfery's Sausage Co., Inc., F. Michael Alfery, Robert M. Alfery. P&S Docket No. D-89-47. 8/29/89.

Vade Yager. P&S Docket No. D-88-91. 8/31/89.

Packing Co., Inc., Adam Nixon, Timothy Messmer, and John
D-89-17. 9/1/89.

Dewey L. Claytor Livestock, Inc. and Dewey L. Claytor. P&S Docket No. D-89-86. 9/1/89.

James M. Gavin, d/b/a J&J Cattle Co. P&S Docket No. D-89-77. 9/7/89.

Bay Springs Food, Inc. and Raymond W. Lynn. P&S Docket No. D-89-21. 9/14/89.

Eastern Kansas Livestock, Inc. and Robert Walrod, Charles J. Borovicka, Dale Koopman, Lucern Smith, James Keen and Robert Stewart. P&S Docket Nos. D-89-35 and D-89-64. 9/14/89.

Eastern Kansas Livestock, Inc. and Robert Walrod, Charles J. Borovicka, Dale Koopman, Lucern Smith, James Keen and Robert Stewart. P&S Docket Nos. D-89-35 and D-89-64. 9/15/89.

Eastern Kansas Livestock, Inc. and Robert Walrod, Charles J. Borovicka, Dale Koopman, Lucern Smith, James Keen and Robert Stewart. P&S Docket Nos. D-89-35 and D-89-64. 9/15/89.

Murray L. Edwards. P&S Docket No. D-88-50. 9/18/89.

Warsaw Packing Co., Inc., Brooks Meats, Inc., Troy L. Brooks, Vaston S. Brooks, Mary Catherine Brooks, and Roy E. Palmer, and Sharon Palmer, d/b/a Palmer's Meat Market. P&S Docket No. D-88-54. 9/21/89.

Ozark Meats, Inc., and Jerry M. Valenta. P&S Docket No. D-89-82. 9/22/89.

Midsouth Feeder Pigs, Inc., Booby C. Neal, and Robert V. Yarbro. P&S Docket No. D-89-93. 9/27/89.

Southwestern Sales Co., Inc. P&S Docket No. D-89-16. 9/29/89.

Gale Walton. P&S Docket No. D-89-29. 10/2/89.

Bruce Brookman, d/b/a C&H Livestock. P&S Docket No. D-89-48. 10/18/89.

Robert A. Yeska. P&S Docket No. D-88-86. 10/19/89.

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